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May 19, 2020

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

2019AP290-CR State of Wisconsin v. Tony Tran (L.C. # 2015CF4012)

Before Brash, P.J., Dugan and Donald, 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).

Tony Tran appeals from a judgment, entered on a jury's verdicts, convicting him of two offenses. Tran also appeals from an order denying his postconviction motion without a hearing. Based upon our review of the briefs and record, we conclude at conference that this case is

Appendix A

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] The judgment and order are summarily affirmed.

In September 2015, the State charged Tran with one count of first-degree sexual assault with a dangerous weapon and one count of armed robbery with the use of force against J.V.H.[2] J.V.H. told police that she had been walking down the street when a man driving a black Chevrolet Impala stopped and offered her a ride. She accepted and when she got into the car, the man put a box cutter to her neck. He drove into an alley, forced her to remove her jeans and underwear, and then forced penis-to-vagina intercourse at knifepoint. Before letting her go, the man kept her purse and cell phone. J.V.H. left the car with only her shirt and sweater but managed to grab her jeans before the car drove off. She ran toward the street, saw a friend, and used his phone to call 911.

J.V.H. had provided a possible license plate number—906-GXR or 609-GXE—for the Impala, so police saturated the area. Officer Kenneth Justus stopped a black Impala with license plate number 906-JXE. The driver, later identified as Tran, was detained, and J.V.H. later identified him in a photo lineup.

Tran was charged as described, and the case was tried to a jury. At trial, J.V.H. testified that she was out walking after fighting with her boyfriend, Devin Buford, when Tran pulled up.

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

[2] Tran was also charged with, but acquitted of, one count of attempted first-degree sexual assault with a dangerous weapon and one count of armed robbery with the use of force against A.D.M. The sole issue on appeal does not relate to the counts involving A.D.M., so we do not discuss those charges further.

J.V.H. further testified that, after she was able to flee Tran's car, she walked to the nearest gas station and called Buford, and they contacted police.

Tran testified that he was out looking for a prostitute and J.V.H. signaled to him to stop. He told her that he only had twenty dollars. She said that she usually did not accept less than forty dollars but would make an exception. They then had consensual intercourse. When Tran went to pay, J.V.H. discovered he had more than twenty dollars and became angry. J.V.H. demanded more money and threatened to call her guy around the corner. Her phone lit up; Tran attempted to grab it and it fell to the center console. Tran armed himself with his box cutter and told J.V.H. to get out of the car. She got out of the car, and he drove away.

As part of the investigation, the police had accessed J.V.H.'s phone, and the jury heard that her phone contained text messages, sent to a contact identified as D.B., that said: "in a car wit a trick. How much?" and "$40 head dun." Detectives testified that these messages were "indicative of prostitution activity" and that the area in question was a high prostitution area. J.V.H. denied that she had engaged Tran as a prostitute.

Officer Justus, who performed the traffic stop, was called by the State. On cross-examination, defense counsel asked Justus about his training and handling of prostitution investigations; this training included attending seminars and conferences and investigating "four or five" human trafficking cases. Defense counsel next asked Justus, "Does the name Devin Buford mean anything to you?" Justus answered affirmatively. Defense counsel then asked, "How do you know the name Devin Buford?" The State objected to this question. The trial court held a sidebar, after which it sustained the State's objection. After Justus's testimony

concluded, the jury was excused and the trial court made a further record, which we will discuss in greater detail below.

The jury convicted Tran. He was sentenced to thirty years' imprisonment on each charge, to be served concurrent with each other but consecutive to any other sentence. Tran filed a postconviction motion in which he alleged a speedy trial violation and plain error from the State's cross-examination of him. The trial court denied the motion, and Tran appeals.

While the notice of appeal indicates that Tran challenges both the judgment of conviction and the order denying postconviction relief, Tran has not renewed the two postconviction issues on appeal. We therefore consider those issues abandoned and we address them no further. *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). The sole issue on appeal is whether the trial court erred in sustaining the State's objection and excluding Justus's answer to the defense question, "How do you know the name Devin Buford?"

"The exclusion of evidence is subject to the [trial] court's discretion." ***State v. Sarfraz***, 2014 WI 78, ¶35, 356 Wis. 2d 460, 851 N.W.2d 235. In reviewing evidentiary issues, the inquiry is not whether this court would have admitted the evidence in question but whether the trial court properly exercised its discretion in accord with accepted legal standards and the facts of record. *See* ***State v. Hunt***, 2003 WI 81, ¶42, 263 Wis. 2d 1, 666 N.W.2d 771.

Tran's theory behind asking Justus about Buford, as paraphrased by the trial court, was that "Buford is a pimp and that [J.V.H.] is one of his prostitutes," which the defense claimed to know because Buford "pays her bills and things like that." The trial court rejected this particular reasoning, explaining it "would mean that any married couple where the wife is a stay-at-home

mom is therefore a prostitute. So that logic doesn't flow." The trial court did, however, ask Justus some questions "to preserve for the record the testimony about Mr. Buford[.]"

The trial court inquired, "So [O]fficer Justus, are you familiar with Devin Buford?" Justus recounted that defense counsel had asked if the name meant anything to him, and Justus explained that he "said yes because I heard the name before, but I don't specifically know anything about Devin Buford." Justus also said that Buford's name did not come up in prostitution investigations "as much as other names"; he had "heard the name before in those circles ... but nothing specifically in regards to human trafficking or just like that. He's somebody that's around."

The trial court then asked Justus about conducting field interviews in anti-prostitution investigations. Justus explained, by way of responding to the court's questions, that he sometimes "will hear different names of people that the person to whom [he is] speaking to believes may be involved in prostitution," but these may be the names of prostitutes, customers, or pimps, and this information varies in reliability from "good quality" to "just wrong." Beyond hearing Buford's name "more than once" during his investigations, though, Justus had no other information about Buford.

The trial court then proceeded to determine whether Justus's knowledge of Buford should be admitted. Generally, all relevant evidence is admissible. *See* WIS. STAT. § 904.02. "Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* ***State v. Burton***, 2007 WI App 237, ¶13, 306 Wis. 2d 403, 743 N.W.2d 152; WIS. STAT. § 904.01. Although evidence may be relevant, it nonetheless "may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" *See* WIS. STAT. § 904.03; ***Burton***, 306 Wis. 2d 403, ¶13.

The trial court first determined that the fact that Buford's name came up in prostitution investigations was "barely relevant, but it is relevant." It explained:

> If Mr. Buford is a pimp, there is an inference that [J.V.H.] was one of his prostitutes and then there is an inference that this particular contact was an act of prostitution. So information that tends to make it more likely that Mr. Buford is a pimp is indeed relevant to that chain of logic and it does make the fact that it could be consensual more likely.

However, the trial court noted that the evidence's probative value was low because there were "three or four steps in logic," each of which reduced the evidence's probative value, and because "the information that Officer Justus has is of the most speculative type." The record reflects that Justus could not recall when, how often, from whom, or in what context Buford's name had come up during his investigations.

The trial court went on to explain that the low probative value of Justus's testimony was "substantially outweighed by the risk of confusion of the issues and the possibility of misleading the jury" by shifting the focus "away from the defendant and away from the victim and … onto Mr. Buford and what information can be ferreted out about [him.]" Thus, the trial court upheld its sidebar ruling sustaining the State's objection and excluding Justus's answer.

On appeal, Tran asserts that the trial court erred in its ruling because Justus's testimony was "admissible to the assessment of J.V.H.'s credibility." He contends that there was no danger of misleading the jury—it already knew Buford's name and that prostitution was part of the

case—but rather, the evidence "sheds light on the conflicting stories before the jury because the evidence is additional evidence that supports [Tran's] defense."[3]

The trial court acknowledged the relevance of Justus's testimony to Tran's case, but concluded that it was not sufficiently probative given other considerations. Considering the dubious basis on which defense counsel claimed to know Buford was a pimp and that Justus's "evidence" was simply hearing Buford's name more than once, the trial court was understandably concerned about the danger of misleading the jury and shifting its focus.[4] The trial court appropriately applied accepted legal standards to the facts of record, and we cannot

[3] Tran thus attempts to analogize his case to that of ***State v. Missouri***, 2006 WI App 74, 291 Wis. 2d 466, 714 N.W.2d 595, where we concluded that the trial court had erroneously excluded evidence going to a witness's credibility. ***Missouri*** involved the admission of other acts evidence against the witness whose credibility was to be challenged, *see* ***id.***, ¶1, but Tran was not seeking to admit evidence that directly impugned J.V.H.'s credibility. Instead, he wanted to admit evidence against a third party, from which the jury was to draw a conclusion about that party, and then draw another conclusion about J.V.H. that Tran hoped would undermine her credibility. ***Missouri*** is, therefore, distinguishable.

[4] The State also argues that Justus's testimony, about information he had heard from others, would have been inadmissible hearsay testimony. *See* WIS. STAT. §§ 908.01(3), 908.02. Tran complains that the State did not make a hearsay objection in the trial court. However, a respondent may advance any argument that would allow us to sustain the trial court's ruling. *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998). We agree with the State's assessment that Justus's testimony about what people said to him about Buford also would have been inadmissible hearsay.

In his reply brief, Tran counters that, even if it were hearsay, Justus's testimony was admissible as expert testimony under WIS. STAT. § 907.02 because Justus "was asked his opinion, based upon his training and experience, of whether Devin Buford was involved in prostitution," and expert testimony may be based on hearsay. *See* WIS. STAT. § 907.03; ***State v. Weber***, 174 Wis. 2d 98, 106-07, 496 N.W.2d 762 (Ct. App. 1993).

This "expert witness" argument is raised for the first time in the reply brief, so we need not consider it. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). However, assuming without deciding that there was sufficient foundation to establish Justus as an expert in prostitution investigations, an expert's testimony must be based on "sufficient facts or data" and must be "the product of reliable principles and methods" applied "reliably to the facts of the case." *See* WIS. STAT. § 907.02(1). Justus might have general experience with conducting prostitution investigations, but he admitted having almost no facts or data about Buford's involvement in prostitution beyond the mere mention of his name, making any specific opinion about Buford inherently unreliable and, thus, inadmissible.

say the trial court's ruling was "a decision that no reasonable judge could make." *See* ***State v. Payano***, 2009 WI 86, ¶52, 320 Wis. 2d 348, 768 N.W.2d 832.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are 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

14

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
Branch 28

STATE OF WISCONSIN,

Plaintiff,

vs.

TONY TRAN,

Defendant.

FILED
CRIMINAL DIVISION
23 JAN 14 2019 28
JOHN BARRETT
Clerk of Circuit Court

Case No. 15CF004012

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On September 25, 2018, the defendant by his attorney filed a postconviction motion to vacate the judgment of conviction on the basis that his constitutional right to a speedy trial was violated. Alternatively, he moves for a new trial based on a claim of plain error.[1] The defendant was charged with one count of first-degree sexual assault, two counts of armed robbery with use of force and one count of attempted first-degree sexual assault. The victims were J.H. and A.M., who each testified at a six-day jury trial that commenced on January 17, 2017. The jury found the defendant guilty of first-degree sexual assault and one count of armed robbery (the offenses pertaining to J.H.) but acquitted him of the second armed robbery count and the attempted sexual assault (the offenses pertaining to A.M.).

The jury heard that J.H. was walking near the south side of Milwaukee. She stated that she had been in a fight with her boyfriend and got out of his car. She was walking along the sidewalk when a person she identified as the defendant pulled up in his vehicle and offered her a ride. The victim got into the defendant's vehicle. He pulled into an alley and armed himself

[1] The court ordered a briefing schedule in this matter, to which the parties have responded.

Appendix B

with a box cutter. He threatened to cut her and to kill her. He made her take off her pants and underwear. He then climbed on top of her and sexually assaulted her by inserting his penis into her vagina. He also sexually assaulted her by inserting his fingers into her mouth and then into her anus. He grabbed her pursue off the dashboard, threw it into the back seat and ultimately ordered her to get out of the car. He stole her phone, which had been in her purse. The victim ran away and flagged down an officer. She provided a description of her attacker and the vehicle he was driving.

The jury heard that A.M. had contact with the defendant on the same date. The defendant was driving the same car and saw A.M. walking down the street. He propositioned her, and she said no. She became nervous and cut through some yards trying to get away from the defendant. She ended up in an alley where the defendant was waiting for her with the same box cutter. He grabbed her by her hair and threw her into the back seat of his car. She tried to get out but the doors were locked. He forced A.M. into the front seat while holding the box cutter. He realized that she had money tucked into her bra, and he took it from her. He held the box cutter to her neck and repeatedly tried to push her head towards his penis, trying to get her to perform oral sex. He ended up shoving her out of the vehicle.

Police stopped the defendant's vehicle and found J.H.'s phone. They also found condoms and wipes inside and money on the defendant's person. DNA testing identified J.H.'s DNA on the defendant's penis and his DNA in her vagina and on her cervix, consistent with the allegations of sexual intercourse. Both victims identified the defendant during a photo array procedure. The jury also heard testimony from the defendant and number of law enforcement and health care witnesses. The defendant maintained that he had consensual sex with J.H. in exchange for money and that she became angry when she discovered that he had more money on

him than they had bargained for. The defendant admitted to having contact with A.M. shortly after having sex with J.H.; however he denied having any *sexual* contact with her. As indicated, the jury found the defendant guilty of the counts relating to J.H. The court sentenced him for these offenses to a total of 30 years of imprisonment, including 20 years of initial confinement and 10 years on extended supervision.

The defendant argues that the delay between his arrest on August 27, 2015 and the commencement of his jury trial on January 17, 2017 violated his constitutional right to a speedy trial. When a defendant asserts a violation of his constitutional right to a speedy trial, the court must balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. ***Barker v. Wingo***, 407 U.S. 514 (1972). The right to a speedy trial is not subject to "bright-line determinations" and must be considered "based on the totality of the circumstances." ***State v. Urdahl***, 286 Wis. 2d 476, 485 (Ct. App. 2005).

The court has reviewed the record as well as the parties' arguments as set forth in their briefs and agrees with the State's analysis of the ***Barker*** factors. The time between the defendant's arrest on August 27, 2015 and his first scheduled jury trial on January 25, 2016 cannot fairly be counted against the State because this delay was attributable to the usual demands of the judicial system and not to the State or the defense. *See e.g.* ***State v. Williams***, 270 Wis. 2d 761, 780 (Ct. App. 2004). That leaves a 12-month delay between the original January 25, 2016 trial date and the completed jury trial, which commenced on January 18, 2017; however, this delay is not solely attributable to the State. The record reflects that the January 25, 2016 trial date was adjourned *at the defendant's request* when he obtained new counsel. The trial was adjourned to March 14, 2016. On February 24, 2016, the parties *jointly* asked to

reschedule the trial date because the State was waiting for a DNA lab report and the defense wanted to test the box cutter for blood evidence. The trial was adjourned to June 22, 2016. On May 23, 2016, the State moved to adjourn the trial due to unavailable law enforcement witnesses without an objection from the defense. The trial was adjourned to August 22, 2016. On that date, the State again moved to adjourn the trial because the two victims did not appear. Defense counsel moved for dismissal. The court granted the State's motion to adjourn for the reasons set forth in the record, (*see* Tr. 8/22/16), and adjourned the trial to January 17, 2017. The court stands by its August 22, 2016 decision to adjourn the trial. The court also stands by its decision denying the defense motion for dismissal. (Tr. 11/23/16).

The record shows that the State had valid reasons to justify the delay. Although the defendant maintains that he was prejudiced, the court finds that he has not demonstrated prejudice. Courts assess the prejudice to the defendant in light of three interests that the speedy trial right was designed to protect: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired. ***Barker***, supra at 532. The defendant does not argue the first factor, because he was in custody throughout the prosecution of this case serving revocation time for an unrelated matter. He only gives lip service to the second factor when he alleges anxiety and concern due to the delay in his case being tried to a jury. The court considered this second factor at the hearing on August 22, 2016, when it granted the State's motion to adjourn the trial. (Tr. 8/22/16, p. 11). The court is not convinced that the alleged anxiety and concern during the 12-month delay in bringing this case to trial was sufficiently prejudicial. The defendant dedicates most of his prejudice argument to the third factor – i.e. that his ability to present a defense was impaired. How? If anything, the delay of the trial in this matter inured to the defendant's benefit. J.H.

testified that she was unable to recall much of what happened. The defendant has not demonstrated how J.H.'s lack of recall prevented him from presenting a defense at trial, particularly when her lack of memory served to undermine her credibility. Too, the jury acquitted him of the charges involving A.M., which undercuts a finding that the delay impaired his ability to present a defense. Under the circumstances, the court finds no violation of the defendant's constitutional right to a speedy trial.

The defendant also moves the court for a new trial based on plain error that occurred during his cross-examination regarding prior convictions. In order for an error to be "plain" within the meaning of section 901.03(4), Stats., it must be "so fundamental that a new trial or other relief must be granted." *Virgil v. State*, 84 Wis. 2d 166, 191 (1978). When a defendant alleges that a prosecutor's statements and arguments constitute misconduct, the test to be applied is whether the statements "so infected the trial with unfairness as to make the resulting convictions a denial of due process." *State v. Mayo*, 301 Wis. 2d 642 (2007). In this instance, the alleged error occurred when the prosecutor picked up on the defendant's two prior convictions during this cross-examination:

[THE PROSECUTOR]: Well, you are a criminal.

THE DEFENDANT: No.

[THE PROSECUTOR]: You've been convicted of two crimes; is that right?

THE DEFENDANT: I have been.

[THE PROSECUTOR]: So you're a criminal?

THE DEFENDANT: No.

[THE PROSECUTOR]: And on that night you committed more crimes?

THE DEFENDANT: No.

(Tr. 1/23/17, pp. 87-88). The defendant argues that the prosecutor's questions were an argument to the jury that he was guilty of the crimes charged because he had been convicted of crimes in the past. The court adopts the State's analysis in its response brief as its response to this issue. Even assuming that the prosecutor's cross-examination was improper, the court is persuaded by the State's harmless error argument at pages 10-11, and in particular because the court instructed the jury to limit its use of prior convictions for credibility purposes. Jurors are presumed to follow the court's instructions. ***State v. Grande***, 169 Wis. 2d 422, 436 (Ct. App. 1992) ("The jury is presumed to follow all instructions given.") Accordingly, the court denies the defendant's motion for a new trial based on plain error.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief is **DENIED.**

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

Mark A. Sanders
Circuit Court Judge

Dated: 1/9/19

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Supreme Court of Wisconsin

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September 16, 2020

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

No. 2019AP290-CR State v. Tran L.C. #2015CF4012

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Tony Tran, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

Appendix C