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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2016AP657-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TYSHUN DEMICHAEL YOUNG,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE JOHN SIEFERT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court appropriately exercise its discretion when it admitted evidence regarding Tyshun DeMichael Young's possible motive for committing the crimes charged?

The circuit court admitted that evidence because it was relevant and not unduly prejudicial. (40:15, 18-19.)

2. If the circuit court erroneously admitted that evidence, was the error harmless?

The circuit court did not address this issue.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

INTRODUCTION

In August 2014, the State filed an amended information that charged Young with one count of attempted first-degree intentional homicide for trying to kill "Adam"¹ and one count of first-degree recklessly endangering the safety of Adam's sister, "Beth." (14.)

¹ This brief uses pseudonyms for the two victims and their brother to protect their identities pursuant to Wis. Stat. § (Rule) 809.86. "Adam" refers to D.D.B., "Beth" refers to D.T.B., and "Carl" refers to D.C.

According to the criminal complaint, on November 10, 2013, Adam and his siblings were at his parents' house to watch a Green Bay Packers game. (2:1-2.) The doorbell rang and Adam's brother, "Carl," answered the door. (2:2.) Carl yelled to Adam that the person at the door asked for him. (2:2.) When Adam arrived at the doorway, the person outside produced a handgun and fired several shots into the house toward Adam. (2:2.) Bullets struck both of Adam's arms and one of Beth's arms. (2:2.) Adam and Carl both identified Young as the shooter. (2:2.)

One of Young's brothers, Wendall Watson,² had been killed exactly one year earlier, on November 10, 2012. (2:2.) Anthony Morgan was charged with that homicide. (2:2.) Adam was present when Watson died. (42:91-92.) Watson was Adam's friend. (41:39-40.) The State named Adam as a witness in the trial against Morgan. (41:40; 42:91.)

Young had a jury trial in September 2014 for shooting Adam and Beth. (40; 41; 42; 43.) Before jury selection, the circuit court addressed Young's motion in limine to exclude all evidence about Watson's death. (40:14-20.) Young argued that this evidence was irrelevant and unduly prejudicial because the State provided nothing "to link that earlier death to the facts of this case." (40:14-15.) The prosecutor explained that the "theory of prosecution" was that Young's belief that Adam was involved in Watson's death provided Young's motive for shooting Adam. (40:15.) Defense counsel noted, however, that the State's witnesses told police that they did not know what Young's motive was. (40:16.)

The prosecutor argued that evidence about Watson's death would be "certainly relevant" if witnesses were willing

² The complaint refers to Watson by his nickname, Chino. (2:2.)

to testify as to Young's motive behind his shooting. (40:17.) The circuit court agreed that this evidence would be "clearly relevant" if witnesses testified that Young performed his shooting in retaliation for Watson's death. (40:17.)

Defense counsel reiterated, however, that the eyewitnesses told police that they did not know why Young shot Adam. (40:17.) The circuit court then said that defense counsel could impeach the State's witnesses on cross-examination if their testimony differed from their statements to police. (40:17-18.) The court said that excluding evidence about Watson's death would be improper because the parties and court did not know how witnesses would testify about that incident. (40:18.)

The prosecutor then informed the circuit court that the shooting at issue here occurred on the one-year anniversary of Watson's death. (40:18.) The court then said, "One year exactly? I think it's relevant. I'm going to allow it." (40:18-19.) Defense counsel asked whether the court was admitting the evidence "[b]ased on the fact that [Watson's death] is supposed to have happened one year before[.]" (40:19.) The court said "that's among the reasons." (40:19.) The court then said that the State's witnesses may have information that they did not give to the police and of which the prosecutor and defense counsel were unaware. (40:19.)

The court told defense counsel that he could object later to the evidence about Watson's death. (40:20.) The court said that it would not exclude that evidence via a motion in limine "because it's dependent on the answer that we're not aware [of]." (40:20.) The court denied Young's motion in limine "at this time[.]" (40:20.)

After jury selection, Young renewed his motion in limine to exclude evidence about Watson's death. (40:99.)

The court denied the motion “[a]t this point[.]” (40:100.) The court told defense counsel that he could object later when that evidence comes in. (40:100.)

Several witnesses testified about Watson’s death. Young objected when the prosecutor asked Adam whether Watson was killed a year before Adam was shot. (41:32.) The court overruled the objection “at this point.” (41:32.) Young objected a moment later when the prosecutor asked Adam whether Young blamed him for Watson’s death. (41:33.) The court overruled that objection. (41:33.) The prosecutor also elicited testimony by a detective and Young’s mother about Watson’s death. (42:36-37, 91-92.) Young did not object to that testimony. (42:36-37, 91-92.) Young did not move to strike any testimony at the close of evidence. (42:76-77, 94-95; 43:30.)

The jury found Young guilty of both counts charged in the amended information. (43:102-03.) Young appeals his judgment of conviction. (31.)

ARGUMENT

The circuit court’s admission of evidence about Young’s brother’s death does not entitle Young to a new trial.

On appeal, Young argues that the circuit court erroneously admitted evidence about Watson’s death because that evidence was irrelevant and unduly prejudicial. (Young Br. 14-19.) He further argues that the circuit court erroneously exercised its discretion because it admitted that evidence based on a mistaken view of the facts. (*Id.* at 19-21.)

Young is not entitled to relief for two separate reasons. First, his claim is meritless because the circuit court

appropriately exercised its discretion when it admitted evidence about Watson's death.³ Second, if the court erred by admitting that evidence, the error was harmless.

A. The circuit court appropriately exercised its discretion when it admitted evidence about Young's brother's death.

The circuit court appropriately exercised its discretion when it ruled that evidence about Watson's death was relevant and not unduly prejudicial. Further, the court was not mistaken about the facts when it made that ruling.

1. Evidence about Young's brother's death was relevant.

"[W]hile motive is not an element of any crime it may nevertheless be a proper subject of inquiry and admissible if it meets the same standards of relevance as other evidence." *State v. Brecht*, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988) (citation omitted). "There are two parts to a relevancy analysis: first, 'whether the evidence relates to a fact or proposition that is of consequence to the determination of the action,' and second, 'whether the evidence has a tendency to make a consequential fact more probable or less probable than it would be without the evidence.'" *State v. Hurley*, 2015 WI 35, ¶ 77, 361 Wis. 2d 529, 861 N.W.2d 174

³ The State agrees with Young that the evidence about Watson's death was not other-acts evidence. (Young Br. 13-14.) Although this Court must consider whether that evidence was relevant and whether its potential for unfair prejudice substantially outweighed its probative value, this Court need not consider the third step under the test for admissibility of other-acts evidence: whether the evidence was offered for a permissible purpose. See *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399 (explaining the three-step test for other-acts evidence).

(quoting *State v. Sullivan*, 216 Wis. 2d 768, 785-86, 576 N.W.2d 30 (1998)).

“Whether evidence is relevant under Wis. Stat. § 904.02 and should be admitted lies within the discretion of the trial court.” *State v. Eison*, 2011 WI App 52, ¶ 10, 332 Wis. 2d 331, 797 N.W.2d 890 (citation omitted). A reviewing court “will not disturb a circuit court’s decision to admit or exclude evidence unless the circuit court erroneously exercised its discretion.” *State v. Hunt*, 2014 WI 102, ¶ 20, 360 Wis. 2d 576, 851 N.W.2d 434 (citation omitted). “[T]he trial court’s failure to explain its reasoning does not mandate reversal; [the court of appeals] will search the record for reasons to support the court’s decision.” *State v. Jensen*, 2007 WI App 256, ¶ 34, 306 Wis. 2d 572, 743 N.W.2d 468 (citation omitted).

Here, with respect to the first relevancy prong, evidence about Watson’s death related to several facts of consequence: Young’s motive, intent, and identity as the person who shot Adam.

Young was charged with and convicted of attempted first-degree intentional homicide for trying to kill Adam. (14; 43:102-03.) Intent is an element of that crime. *State v. Burroughs*, 2002 WI App 18, ¶ 26, 250 Wis. 2d 180, 640 N.W.2d 190. Motive and intent both relate to a fact of consequence when, as here, intent is an element of a charged crime. *State v. Anderson*, 230 Wis. 2d 121, 130-31, 600 N.W.2d 913 (Ct. App. 1999).

Likewise, evidence about Watson’s death related to Young’s identity. Identity is a fact of consequence when a defendant disputes being the perpetrator. See *State v. Hammer*, 2000 WI 92, ¶ 30, 236 Wis. 2d 686, 613 N.W.2d 629. Evidence of a defendant’s motive to commit a crime

helps to establish the defendant's identity as the perpetrator of the crime. *See State v. Zimmerman*, 2003 WI App 196, ¶¶ 27-28, 266 Wis. 2d 1003, 669 N.W.2d 762. Here, Young presented an alibi defense. (41:15-17; 42:81-82.) Accordingly, evidence about Watson's death related to Young's motive for shooting Adam and, therefore, his identity as the shooter.

With respect to the second relevancy prong, evidence about Watson's death tended to make Young's motive, intent, and identity as the shooter more probable. At trial, the State introduced evidence that Watson was killed exactly one year before the shooting at issue occurred. (41:33; 42:37.) The anniversary of a loved one's death sometimes motivates people to commit crimes. *See People v. Garcia*, 651 N.E.2d 100, 113 (Ill. 1995). Further, evidence that supports a person's desire for revenge is relevant as proof of motive. *See Haskins v. State*, 97 Wis. 2d 408, 413, 294 N.W.2d 25 (1980). That the shooting at issue here occurred on the one-year anniversary of Watson's death is probative of Young's motive and intent to avenge Watson's death. Accordingly, the evidence about Watson's death was relevant because it met both prongs of the relevancy test.

Further, Watson's death was probative of Young's motive to target Adam for revenge and, hence, Young's identity as the person who shot Adam. At trial, Adam testified that he was Watson's friend and that he knew Young through Watson. (41:39-40, 42-43.) Young's mother testified that Adam was present when Watson was killed. (42:91-92.) The person who killed Watson claimed self-defense. (42:91.) Young's mother and Adam both testified that the State named Adam as a witness in the trial against the person who killed Watson. (41:40; 42:91.)

The foregoing evidence tended to increase the probability that Young blamed Adam for Watson's death. As

the circuit court explained, the important issue regarding Young's motive is not what roles people played in Watson's death, but rather "what role some people might have thought they played[.]" (40:99-100.) Young might have thought that Adam was involved in Watson's death even if he actually was not involved. Watson's death was probative of Young's identity as the person who shot Adam.

Young argues that the evidence about Watson's death was irrelevant because it required the jury to speculate that Young blamed Adam for Watson's death. (Young Br. 15-17.) Young notes that no witnesses testified that Young blamed Adam for Watson's death. (*Id.* at 16.)⁴

However, "[t]estimony is irrelevant and therefore inadmissible that is so inconclusive and speculative as to have no probative value." *State v. Schael*, 131 Wis. 2d 405, 412, 388 N.W.2d 641 (Ct. App. 1986) (citations omitted). "[A]ny fact which tends to prove a material issue is relevant, even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable." *Barrera v. State*, 99 Wis. 2d 269, 280, 298 N.W.2d 820 (1980) (quotation marks and quoted source omitted). Accordingly, to be probative, the State's evidence about Watson's death did not need to prove Young's motive for shooting Adam.

⁴ Young asserts that "[t]he State did not attempt to impeach a witness, or put in direct evidence through a witness, that [Young] blamed [Adam]" for Watson's death. (Young Br. 16.) That assertion is untrue. The State attempted to recall Adam's sister, Beth, so she could testify that Adam told her that Young shot him because Young believed that Adam was involved in Watson's death. (42:51-52.) The circuit court heard arguments by both parties and concluded that this testimony was inadmissible hearsay. (42:52-57.)

Rather, that evidence needed to—and did—have a tendency to make Young’s motive to shoot Adam more probable. The evidence about Watson’s death would have been *more* probative if the State introduced testimony that Young blamed Adam for Watson’s death. But, contrary to Young’s contention, the absence of such testimony does not mean that the evidence about Watson’s death had *no* probative value.

Young also seems to argue that the evidence about Watson’s death was inadmissible under the test for third-party suspect evidence. (Young Br. 15.) However, that evidence was not third-party suspect evidence. The State did not offer that evidence to show that someone besides Young committed the crimes with which he was charged.

In short, the evidence about Watson’s death was relevant and admissible.

2. The potential for unfair prejudice resulting from the evidence about Young’s brother’s death did not substantially outweigh its probative value.

“Evidence that is relevant ‘may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.’” *Hurley*, 361 Wis. 2d 529, ¶ 87 (quoting Wis. Stat. § 904.03 (2011-12)). “Evidence that is highly relevant has great probative value, whereas evidence that is only slightly relevant has low probative value.” *Id.* (quoting *State v. Payano*, 2009 WI 86, ¶ 81, 320 Wis. 2d 348, 768 N.W.2d 832). “Prejudice is not based on simple harm to the opposing party’s case, but rather ‘whether the evidence tends to influence the outcome of the case by improper means.’” *Id.* (quoting *Payano*, 320 Wis. 2d 348, ¶ 81).

A defendant bears the burden of establishing that the danger of unfair prejudice substantially outweighs evidence's probative value. *State v. Martinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399 (citation omitted). A circuit court has "broad discretion" when applying this balancing test. *Nowatske v. Osterloh*, 201 Wis. 2d 497, 503, 549 N.W.2d 256 (Ct. App. 1996) (citation omitted).

Young argues that the evidence about Watson's death was "unduly prejudicial" because the "homicide of a sibling" could arouse an emotional response in a jury. (Young Br. 18-19.)

The circuit court properly exercised its broad discretion when it rejected that argument. As the court explained, "I don't see how [evidence of Watson's death] prejudices [Young]. It may be sympathetic. People may be filled with compassion at the loss of his brother." (40:15.)

Young also argues that the circuit court's response upon learning that the shooting in this case occurred on the one-year anniversary of Watson's death "shows the emotional power of the anniversary." (Young Br. 21.) Specifically, the circuit court said, "One year exactly? I think it's relevant. I'm going to allow it." (40:18-19.) The court then clarified that the timing of Watson's death was "among the reasons" why the evidence about Watson's death was admissible. (40:19.) Contrary to Young's suggestion, the circuit court's reaction shows that the anniversary evidence was not emotional but rather was probative of Young's motive to commit the crimes charged.

3. The circuit court was not mistaken about the facts when it admitted evidence about Young's brother's death.

Young argues that the circuit court was mistaken about the facts when it denied his motion in limine to exclude evidence about Watson's death. (Young Br. 19-20.) He contends that this ruling was based on the court's mistaken impression that the State would introduce testimony that Young blamed Adam for Watson's death. (*Id.*)

To the contrary, the court was well aware that the State might be unable to elicit such testimony. For example, defense counsel said that the eyewitnesses to the shooting told police that they did not know why it happened. (40:16.) However, the prosecutor said that some witnesses may be willing to testify as to Young's motive for the shooting. (40:17.) The court then said: "*If*, for example, one of the victim/witnesses says he told me he shot me because this is in retaliation for my brother, clearly relevant." (40:17 (emphasis added).)

The circuit court noted several more times that it was unsure whether witnesses would testify as to Young's motive for the shooting. The court said that defense counsel may be able to impeach witnesses with their statements to police "if they testify differently at trial." (40:17-18.) The court said that it would not grant Young's motion in limine to exclude evidence about Watson's death "because we don't know what the testimony is going to be." (40:18.) The court also said that the State's witnesses "may have things they may not have revealed to the police or the prosecutor which might be relevant at a trial. And if they have such evidence, I don't think they should automatically be told by the Prosecutor that they can't reveal it in response to a question." (40:19.) The court concluded that it would not exclude evidence about

Watson's death "because it's dependent on the answer that we're not aware [of]." (40:20.)

In sum, the circuit court properly exercised its discretion when it admitted evidence about Watson's death.

B. Alternatively, if the circuit court erred by admitting evidence about Young's brother's death, the error was harmless.

An erroneous admission of evidence does not automatically require reversal but rather is subject to harmless error analysis. *State v. Britt*, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996) (citations omitted). "For an error to be harmless, the party who benefitted from error must show that "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Deadwiller*, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W.2d 362 (quoting *State v. Martin*, 2012 WI 96, ¶ 45, 343 Wis. 2d 278, 816 N.W.2d 270).

Here, if the circuit court erroneously admitted evidence about Watson's death, that error was harmless for several reasons. First, the only testimony about Watson's death to which Young objected was cumulative with other evidence. Evidence that is erroneously admitted is harmless if it is cumulative with other, unobjected-to evidence. See *Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis., S.C.*, 2005 WI App 217, ¶ 33, 287 Wis. 2d 560, 706 N.W.2d 667.

Here, Young's only objection to evidence about Watson's death occurred during Adam's testimony. Specifically, the prosecutor asked Adam if Watson was killed one year before Adam was shot and if Adam had any idea why Young shot him. (41:32-33.) Young objected to both

questions, and the circuit court overruled both objections. (41:32-33.) Adam answered the first question in the affirmative and said that he did not have any such idea. (41:32-33.)

Young, however, did not object to subsequent witnesses' testimony about Watson's death. Specifically, Young did not object when a detective testified that Watson died exactly one year before the shooting at issue occurred and further testified that Adam said he did not know why Young shot him. (42:36-37.) Thus, the detective's testimony was cumulative with Adam's testimony to which Young objected. Similarly, Young did not object when his mother testified about Watson's death. (42:91-92.) Adam's testimony about Watson's death is cumulative and thus harmless.

Second, as the circuit court noted, evidence about Watson's death could have made the jury sympathetic toward Young. (40:15.) An error that benefits the complaining party is harmless. *See Kruse v. Horlamus Indus., Inc.*, 130 Wis. 2d 357, 367, 387 N.W.2d 64 (1986); *Wirsing v. Krzeminski*, 61 Wis. 2d 513, 523, 213 N.W.2d 37 (1973). That the evidence about Watson's death may have created sympathy for Young supports the conclusion that this evidence was harmless.

Third and finally, the evidence about Watson's death was harmless because it was a minor piece of evidence. For example, in *State v. Weed*, the supreme court held that the erroneous admission of evidence was harmless because, *inter alia*, it "was a minor piece of evidence" with "low probative value[.]" *State v. Weed*, 2003 WI 85, ¶¶ 31-32, 263 Wis. 2d 434, 666 N.W.2d 485. If Young is correct that evidence about Watson's death had no or low probative value, then it did not contribute to the guilty verdicts because it was a minor piece of evidence. As explained above, that evidence related to

Young's motive and, therefore, intent and identity as the shooter. However, the State introduced much stronger evidence to prove both identity and intent.

The State's strong evidence of Young's intent to kill Adam focused on the facts of the shooting. According to trial testimony, a person rang the doorbell at Adam's parents' house. (41:27, 50-52, 105.) Adam lived there at the time. (41:50.) Adam's brother, Carl, answered the door. (41:52.) The person at the door asked for Adam by his nickname. (41:52, 108-09.) The person identified himself as "Jet" and did not say anything else to Carl. (41:63, 66.) Carl and his sister, Beth, who was also standing near the doorway, yelled to Adam that someone was at the door for him. (41:28, 52, 108-09; 42:11.) Adam went to the door. (41:28, 52, 66.) The person opened fire immediately after he and Adam saw each other. (41:30, 66, 110.) Adam was shot in both arms and one leg. (41:30.) The shooter fired four to six shots total. (41:30, 54, 118.)

The State's strong evidence of Young's identity as the shooter focused on the three eyewitnesses' identifications of him. Adam testified that he was absolutely positive that Young was the person who shot him. (41:28-29.) Adam had known Young for between two and five years. (41:24.) Carl testified that he identified Young as the shooter in a police photo array. (41:53, 56-57, 84-85.) Carl told police that he was about 90 percent sure that his identification was correct. (41:58.) Further, Carl testified that he was 100 percent sure that he correctly identified the shooter. (41:58-59, 67.)⁵ Beth identified Young in the courtroom during the trial as the

⁵ Carl was unable to identify Young in the courtroom at trial. (41:53.) However, Young changed his hairstyle since the shooting, going from an Afro-style haircut to corn rows. (41:125; 42:25.)

person who shot her. (41:123.) She was “[a]bsolutely” confident and had no doubt “whatsoever” that Young was the shooter. (41:125-26; 42:25.)⁶

In sum, if the circuit court erred by admitting evidence about Watson’s death, that error was harmless.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm Young’s judgment of conviction.

Dated this 14th day of September, 2016.

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⁶ Beth was unable to identify the shooter in a police photo array. (41:124-25; 42:20-22.) However, she was leaning toward picking one of the people pictured in the array but she was unsure because that person’s eyes were not fully open. (42:21.) Young was squinting in his picture in the photo array. (43:20.) Further, Beth looked at the photo array one day after she underwent major surgery due to her gunshot wound. (41:125.) She was “highly sedated” from morphine when she saw the photo array. (41:123.)

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3837 words.

SCOTT E. ROSENOW
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of September, 2016.

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