COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2711-CR **Cir. Ct. No. 2002CF3952**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK T. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Mark T. Smith appeals from a judgment convicting him of one count of second-degree recklessly endangering safety while using a dangerous weapon. On appeal, Smith contends that his confrontation rights were violated during his trial and that the trial court improperly allowed the

submission of evidence without proper foundation. Smith also contends that the jury was not properly instructed on an accident theory of defense. We reject both contentions and affirm.

¶2 We begin by summarizing the key evidence submitted to the jury. Smith told the jury that he called John Peterson on the morning of June 23, 2002, and told Peterson he was upset. Smith testified that he went to a dwelling Peterson shared with Smith's mother. Smith testified that he shared a "blunt" of marijuana with Peterson and then left. Smith admitted to returning to Peterson's dwelling later that afternoon.

¶3 Peterson testified that Smith made verbal threats during both Peterson's morning and afternoon visits. With respect to Smith's afternoon visit, both men testified that a number of brief physical encounters ensued between the two, with Smith attacking Peterson and Peterson tackling and subduing Smith. Peterson testified that Smith announced he was leaving but returned a few moments later wielding a knife. Peterson grabbed a hammer and Smith retreated to the kitchen.

¶4 Peterson testified that Smith then returned to the living room while Peterson was on the phone calling the police. Peterson told the jury that Smith walked up and hit him in the head with a full can of soda. Peterson stated that he then tackled Smith to the floor but because Smith promised to leave, Peterson let him up.

¶5 Peterson described to the jury what happened next: rather than leave the residence, Smith returned, holding a meat cleaver in one hand and a knife in the other. Peterson reported that Smith's brother talked Smith out of doing anything and he left the house. After a short interval, Smith crashed through a

screen door and attacked Peterson. As Peterson attempted to block one of Smith's blows, Smith cut one of Peterson's hands with the meat cleaver.

¶6 Smith testified to a different set of facts leading to Peterson's injury. Smith stated that he went to the kitchen when he saw Peterson coming towards him with a hammer in his hand. Smith stated that he armed himself with a knife, that Peterson grabbed the blade in the ensuing confrontation and cut himself.

¶7 On cross-examination, Smith claimed that he behaved peacefully during his morning visit to his mother's home. On rebuttal, the State introduced a copy of a CAD (Computer-Assisted Dispatch) report showing that Smith's mother called police at 8:31 a.m. on the day in question to report that her son was at her home "destroying property." The court admitted the report as a business record over Smith's objection.

¶8 Smith requested the circuit court to instruct the jury on two defense theories—accident and self-defense. The circuit court denied the request, concluding the defenses were mutually exclusive; the circuit court directed Smith to choose one. Smith chose the instruction on self-defense. The jury returned a guilty verdict on second-degree recklessly endangering safety while armed with a dangerous weapon. Smith appeals, contending he is entitled to a new trial because his confrontation rights were violated by the admission of the police report on rebuttal and because the trial court denied Smith's request for a jury instruction on his defense theory that Peterson's injuries resulted from an accident.

The Circuit Court's Evidentiary Ruling

¶9 The State introduced the CAD report during the rebuttal phase of trial through Milwaukee Police Detective Sylvia Johnson. The report indicated

that on June 23, 2002, at 8:31 a.m., Rose Smith called police to report that her son, Mark Smith, was at her home "destroying property." The State argued to the circuit court that the report was relevant because it contradicted Smith's testimony that he was peaceful during his morning visit to Peterson on the day of the incident. The State contended that Detective Johnson was qualified to offer the report because she was "a member of that department and relies on that report in the course of her duties." Smith objected on both confrontation and hearsay grounds. The court ruled that while the report contained hearsay within hearsay, it was nevertheless "inherently reliable."

¶10 On appeal, Smith repeats both his confrontation and hearsay objections to the CAD report. Smith invites this court to conclude that Rose Smith's statements to police were testimonial in nature and therefore violated Smith's confrontation rights under ***Crawford v. Washington***, 541 U.S. 36 (2004). Smith also requests the court to conclude that the evidence was not offered by a properly qualified witness and was hearsay.

¶11 We decline to address either of Smith's arguments about the CAD report because any potential error by the circuit court in admitting the report was harmless.[1] An error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

[1] A violation of the Confrontation Clause is subject to harmless-error analysis. ***Delaware v. Van Arsdall***, 475 U.S. 673, 684 (1986); ***State v. Weed***, 2003 WI 85, ¶28, 263 Wis. 2d 434, 666 N.W.2d 485. ***Crawford v. Washington***, 541 U.S. 36 (2004), does not suggest that its ruling is not also subject to harmless-error analysis.

¶12 We have reviewed the trial testimony. The CAD report is a small piece of evidence addressing Smith's conduct many hours before the attack underlying this prosecution. It had no bearing on either of Smith's defense theories. Furthermore, to the extent the CAD report influenced the jury's assessment of Smith's credibility, such influence was minimal in comparison to the evidence of Smith's ten prior felony convictions placed before the jury. Furthermore, Smith's credibility was seriously challenged when the jury learned that Smith did not tell police that Peterson allegedly armed himself with a hammer prior to Smith's arming himself with a knife in self-defense, but waited until trial to tell this story. We conclude from our analysis of the evidence that it is clear beyond a reasonable doubt that a rational jury would have found Smith guilty even if the CAD report had been excluded from the evidence.

The Jury Instructions

¶13 Smith requested the circuit court to instruct the jury on alternative defense theories—that Peterson's injuries were accidental or were the result of Smith's acting in self-defense. The trial court ruled that any jury instruction required a basis in the evidence and that these defense theories were mutually exclusive. Smith argues on appeal that the circuit court erroneously exercised discretion when it denied his request for both instructions.

¶14 When a defendant appeals from the denial of a requested instruction, "the evidence is to be viewed in the most favorable light it will reasonably admit from the standpoint of the accused." ***Johnson v. State***, 85 Wis. 2d 22, 28, 270 N.W.2d 153 (1978) (citation omitted). A trial court is not required to give the requested instruction unless the evidence reasonably requires it. ***Id.***

¶15 Here, the evidence was undisputed that Smith intentionally armed himself and used a knife in a physical confrontation with Peterson. It is immaterial whether Smith was armed and using the knife for a defensive purpose as he claimed or an offensive purpose as Peterson testified. An accident instruction is not appropriate in either instance because a reasonable person cannot arm himself or herself with a knife and engage in a physical struggle with another human being without an awareness of creating a risk of physical harm. Accordingly, we conclude as a matter of law that the circuit court did not err in declining to give a defense instruction on accident to the jury.

By the Court.—Judgment affirmed.

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