COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1245-CR **Cir. Ct. No. 2006CF399**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER GAMBLE WHYTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Peter Whyte appeals a judgment, entered upon a jury's verdict, convicting him of second-degree intentional homicide. Whyte argues that the admission of hearsay evidence violated his right to confrontation. We conclude the error, if any, in admitting the challenged testimony was harmless

in light of the overwhelming evidence of Whyte's guilt. We therefore affirm the judgment.

BACKGROUND

¶2 The State charged Whyte with first-degree intentional homicide, arising from the August 20, 2006 stabbing death of his long-time girlfriend, Suzanne Weiland. The doctor who performed Weiland's autopsy testified that Weiland, 5' 7" tall and 150 pounds, had a blood alcohol concentration of 0.31% at the time of her death. Weiland had suffered nineteen knife injuries, several of which were significant enough to have caused her death if left untreated. Three of the deep stab wounds were to her neck and would have caused death within minutes of their infliction. The doctor opined that Weiland died from "exsanguination" due to multiple stab wounds.

¶3 Whyte, 6' 4" tall and 283 pounds, testified he had been involved with Weiland since 1986, living together on and off throughout their relationship. According to Whyte, Weiland had a history of staying out all night without him and coming home intoxicated. Whyte testified that on three occasions in the month leading up to Weiland's death, she came home intoxicated and said she wanted to kill Whyte. The next morning, however, she acted as if nothing happened.

¶4 On the night of August 20, the couple returned home after an evening of drinking and Weiland indicated she wanted to have sex. When Whyte declined, Weiland became angry. Whyte consequently took a walk outside for approximately twenty to forty minutes. Whyte testified that shortly after he returned home, Weiland came at him with a knife and stabbed him. Whyte further claimed that when he indicated he needed to go to the hospital, Weiland said "we

are going to see Ash"—Weiland's dog that had been euthanized earlier that spring. Weiland then attacked Whyte again, stabbing him in the stomach. At that point, Whyte grabbed the knife and knocked Weiland back with his elbow. As he pulled the knife out of his belly, Weiland stated "I am going to kill you." Weiland then came at Whyte with a butcher knife in her right hand. Whyte grabbed Weiland's hand and as she started to turn, Whyte stabbed her twice in the back.

¶5 The couple struggled to the floor, each with a knife. Whyte testified that as they struggled, he started stabbing her until she stopped struggling. Whyte indicated he was afraid for his life and believed Weiland intended to kill him. Whyte further testified that he was badly wounded and having trouble breathing. He ultimately passed out and when he awoke, she was dead next to him. Whyte testified that he "freaked out" and attempted to kill himself by cutting across his wrists. He then walked out of the house to the pier and after thinking of his son, returned home. Whyte indicated he passed out a second time and when he awoke, he crawled over to Weiland's body where he passed out again. Upon waking, he moved to a family room recliner and called emergency personnel. A surgeon who treated Whyte testified he suffered several knife wounds to his chest and abdomen, causing injuries to his lungs, stomach, liver and spleen.

¶6 Whyte did not dispute that Weiland died as a result of the fight between them; however, he claimed he was merely acting out of self-defense. The jury was instructed on both first-degree intentional homicide and second-degree intentional homicide, and ultimately convicted Weiland of second-degree intentional homicide. The court imposed a sixty-year sentence consisting of forty years' initial confinement and twenty years' extended supervision. This appeal follows.

DISCUSSION

¶7 Whyte argues that the admission of hearsay evidence violated his right to confrontation. In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [or her] ....” U.S. CONST. amend. VI. Whether the admission of evidence violates an accused’s right to confrontation is a question of law that this court reviews independently. ***State v. Williams***, 2002 WI 58, ¶7, 253 Wis. 2d 99, 644 N.W.2d 919. The first step in analyzing a confrontation violation claim is to determine whether the challenged statement is testimonial or non-testimonial. *See* ***Crawford v. Washington***, 541 U.S. 36, 68 (2004).

¶8 The Confrontation Clause bars admission of an out-of-court testimonial statement unless the declarant is unavailable and the defendant had a prior opportunity to examine the declarant with respect to the statement. ***Id.*** at 68-69; ***State v. Jensen***, 2007 WI 26, ¶15, 299 Wis. 2d 267, 727 N.W.2d 518. The ***Crawford*** Court set forth three formulations for determining whether a statement is testimonial. ***Crawford***, 541 U.S. at 51-52. Relevant to this appeal, hearsay is testimonial if the statement was “‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” ***Id.*** at 52 (citation omitted).

¶9 Here, Whyte challenged the admission of certain testimony from Weiland’s friend, Colleen Wittenburg-Holzschuh; Weiland’s brother, Patrick Weiland; and Weiland’s mother, Mary Weiland. Wittenburg-Holzschuh testified that Weiland told her she did not like having sex with Whyte because he was too rough. Patrick testified that Weiland complained she did not like having sex with Whyte and did not like his desire to have anal intercourse. According to Patrick,

Weiland also told him that in May 2006, Whyte was violent toward her and had beaten her. In the week prior to her death, Weiland told Patrick that her relationship with Whyte was over and although she was going on a trip with him, she was not going to have sex with him. Mary testified that in April 2003, Weiland told her Whyte had choked her, beaten her and violated her sexually without her consent. Mary further testified that Weiland indicated she feared violence from Whyte throughout their relationship, including the last night she saw her daughter alive—August 17, 2006. On that evening, Weiland told her mother not to worry, that she did not love Whyte and she was going to leave him.

¶10 The trial court ruled, and the prosecutor conceded, that the challenged statements were testimonial. The court nevertheless applied the doctrine of forfeiture by wrongdoing to admit the statements. *See* ***Crawford***, 541 U.S. at 62 (holding that one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation). On appeal, Whyte contends the trial court erred by applying the forfeiture by wrongdoing doctrine. In turn, the State contends that the trial court did not need to apply the doctrine because the challenged statements were not testimonial.[1] We need not address these arguments because we conclude the error, if any, in admitting the challenged testimony was harmless in light of the overwhelming evidence of Whyte's guilt.

¶11 Violation of the Confrontation Clause "does not result in automatic reversal, but rather is subject to harmless error analysis." ***State v. Weed***, 2003 WI

[1] This court is troubled the State would concede in the trial court that the challenged statements were testimonial, and then argue a contrary position on appeal. Although Whyte does not pursue the argument, nor would it affect the outcome of this appeal, the State's contrary position appears to raise an issue of judicial estoppel. *See* ***State v. Michels***, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987).

85, ¶28, 263 Wis. 2d 434, 666 N.W.2d 485. The test for harmless error was set forth by the Supreme Court in ***Chapman v. California***, 386 U.S. 18 (1967). There, the Court explained that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." ***Id.*** at 24. An error is harmless if the beneficiary of the error proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[2] ***Id.***

¶12 As noted above, the jury was given the following instructions on the charged crime of first-degree intentional homicide and the lesser-included crime of second-degree intentional homicide:

> Peter Whyte is guilty of first-degree intentional homicide if [he] caused the death of Suzanne Weiland with the intent to kill and did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself.
>
> Peter Whyte is guilty of second-degree intentional homicide if [he] caused the death of Suzanne Weiland with the intent to kill, and actually believed the force used was necessary to prevent imminent death or great bodily harm to himself, but his belief was unreasonable.

By finding him guilty of the lesser-included offense, the jury necessarily concluded that Whyte believed the force used was necessary to prevent imminent death or great bodily harm to himself, but that his belief was unreasonable. None

[2] In his reply brief, Whyte cites ***Delaware v. Van Arsdall***, 475 U.S. 673 (1985), to suggest that in the context of Confrontation Clause violations, the harmless error analysis does not focus on the outcome of the trial but, rather, whether the challenged evidence caused the jury to put less weight on Whyte's testimony. The subject passage states: "While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole … the focus of the Confrontation Clause is on individual witnesses." ***Id.*** at 680. This language, however, was not used in context of a harmless error analysis. Rather, the court was discussing the prejudice inquiry in determining whether a defendant's confrontation right had been violated in the first instance.

of the challenged statements bear on the jury's determination whether the amount of force used was reasonable.

¶13 Whyte nevertheless argues the challenged testimony "tarred" his character, thus affecting whether the jury believed his testimony that he acted reasonably in self-defense. We are not persuaded. In light of the evidence—including their size disparity, Weiland's intoxication, and the sheer number of stab wounds Weiland suffered, many of which could have been independently fatal—it is wholly inconceivable that a jury could find that any subjective belief Whyte had regarding the amount of force used was reasonable. Because the challenged statements were inconsequential to the evidence of Whyte's guilt, any error in their admission does not undermine our confidence in the conviction. *See* ***Williams***, 253 Wis. 2d 99, ¶50.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).