COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP657-CR **Cir. Ct. No. 2013CF5132**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYSHUN DEMICHAEL YOUNG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 BRENNAN, P.J. Tyshun DeMichael Young appeals from a judgment of conviction, entered on a jury verdict, for one count of attempted first-degree intentional homicide and one count of first-degree recklessly endangering

safety with use of a dangerous weapon. Young was charged in connection with a shooting on November 10, 2013, that injured the targeted person, Adam,[1] and his sister, Beth, who was standing nearby. Young seeks to have his conviction vacated on the grounds that the trial court erred when it permitted the jury to hear testimony that exactly one year prior to Adam's shooting, Adam had been present when Young's brother, Wendall Watson (Wendall), was killed in a shooting.[2] Young argues this is error because the correlation to the one-year anniversary is irrelevant and because the risk of unfair prejudice outweighs any probative value.

¶2 We conclude that the trial court applied the proper standard of law to the facts of this case, and its decision to allow the jury to hear about the shooting that occurred on the same day the prior year was reasonable. We further conclude that even if the decision was error, the error was harmless. Therefore we affirm.

BACKGROUND

¶3 At about 12:30 p.m. on November 10, 2013, a man wearing a hoodie came to the side door of Adam's home, rang the doorbell repeatedly, and when Adam's brother, Carl, answered the door, the man asked specifically for Adam, using a nickname used by his family and close friends. Family members called for Adam to come to the door, and when he did, he recognized Young, a person he had known for several years. Young pulled a gun and fired several shots toward

[1] "Adam" refers to D.D.B., "Beth" refers to D.T.B., and "Carl" refers to D.C. We refer to the victims and their brother with the pseudonyms that the State's brief assigned them for ease of reading while protecting their identities. WIS. STAT. § 809.86 (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. Young was convicted under the statutes in effect at the time of his offense, the 2013-14 statutes. However, since the relevant statutes have not changed, we will refer to and cite from the current version.

[2] A man was charged with the homicide, he argued self-defense, and Adam was to be a witness at the trial. The case was resolved on a plea agreement.

Adam before fleeing. Adam sustained through and through gunshot wounds to both arms, but survived.

¶4 Adam's mother, who was in a nearby room, immediately asked him who had shot him, and he told her it was Young. She relayed this to the detective who interviewed her about the shooting. When police showed Adam a photo array, he recognized Young, said he had known him for several years, and identified him as the shooter.

¶5 Adam's brother and sister were both present when Adam was shot. Neither knew Young. Carl, the brother who initially answered the door, told police he had never seen Young before. When he was separately interviewed shortly after the shooting, he picked Young from a photo array. His sister, Beth, had her four-year-old daughter with her, and she was hit by a bullet as she tried to escape once the shooting started. She was shown a photo array after she was taken to the hospital and did not identify Young or any other person in the photos.

Young's arrest and trial.

¶6 Young was charged in a criminal complaint on November 15, 2013, and arrested on a warrant, January 30, 2014. He was charged with attempted first-degree homicide and first-degree reckless endangerment, with use of a dangerous weapon enhancer.

¶7 Young brought a motion in limine seeking to exclude evidence concerning the date of the 2012 shooting death of his brother Wendall—and the connection Adam and Young had to it—as irrelevant and unduly prejudicial. The State argued that the one-year anniversary shooting evidence was relevant to motive—their theory being that Young believed that Adam was someone involved

in Watson's shooting. Trial counsel argued that the State had no witnesses expressly saying that. The trial court denied the motion, saying it would see what the witnesses testified to at trial.

¶8 The case was tried to a jury September 2 to 4, 2014. Both of the victims testified.

¶9 Trial counsel elicited testimony at trial from Young's mother that she did not know any reason why her son, Young, would have wanted to shoot Adam. She testified that Adam was present at her son Wendall's death and was to be a witness at trial although he had not made a statement. She disagreed with the prosecutor's suggestion that Adam would have been a defense witness. She believed he would have testified for the State. The person who was charged in that case claimed self-defense.

¶10 The State's questioning and the two defense objections[3] that form the basis for Young's arguments on appeal is the following direct examination of Adam by the prosecutor:

> [Prosecutor]: You're friends with the defendant, Mr. Young, right?
>
> [Adam]: At least I thought I was.
>
> [Prosecutor]: Did you know the defendant's brother, Wendall Watson?
>
> [Adam]: Yes.
>
> [Prosecutor]: Mr. Watson was killed the year before you were shot?

[3] These were the only objections in the record regarding the shooting anniversary.

> [Trial Counsel]: I'm going to object to this line of questioning.
>
> [The Court]: Overrule at this point.
>
> [Prosecutor]: Mr. Watson the defendant's brother was shot and killed a year before you were shot, right?
>
> [Adam]: Yes
>
> [Prosecutor]: In fact, it was a year to the day on November 10 of 2012?
>
> [Adam]: Yes.
>
> [Prosecutor]: Now, do you have any idea why the defendant would shoot you?
>
> [Adam]: No.
>
> [Prosecutor]: Did the defendant blame you for his brother's death?
>
> [Trial Counsel]: I'm going to object. It calls for speculation.
>
> [Adam]: Not to my knowledge.

¶11 At trial, the State presented evidence of Young's identity as the shooter through three witnesses: Adam, Carl through the photo array identification, and Beth through her in-court identification of Young as the shooter—after her earlier inability to identify the shooter at her photo array.

¶12 Two witnesses testified for the defense. Young's mother testified that he was in Chicago on the date of the shooting. Her testimony was that Young had moved to Chicago the previous year following his brother's death and had remained there to care for his ninety-three-year-old great-grandmother. Young's mother testified that on the day of the shooting, Young had called her from a landline from Chicago twice, once in the morning, and again after returning from church at about 1 p.m. The second defense witness was a detective who had

investigated the shooting of Adam and Beth. He testified about how the victims had described to him the shooter and the gun, and counsel sought to highlight inconsistencies between the descriptions. Young did not testify.

¶13 The jury convicted Young on both counts. This appeal follows.

DISCUSSION

I. The trial court's determination of relevance under WIS. STAT. § 904.01 (2015-16).

A. Standard of review.

¶14 This case involves a challenge solely to an evidentiary decision. This court reviews an evidentiary decision under the discretionary standard of review. ***LaCrosse Cty. Dep't of Human Servs. v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194. Upon review of evidentiary issues, "[t]he question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). We will sustain a discretionary act if the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). "This court will not find an abuse of discretion if there is a reasonable basis for the trial court's determination." ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). "Because the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary determinations." ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 155 Wis. 2d 365, 374, 455 N.W.2d 250 (Ct. App. 1990).

B. The relevance of the shooting anniversary evidence.

¶15 Young argues on appeal the one-year shooting anniversary testimony was not relevant and was unduly prejudicial.[4] We first address his relevance argument.

¶16 Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* WIS. STAT. § 904.01. "The criterion of relevancy is whether the evidence sought to be introduced would shed any light on the subject of inquiry." ***Rogers v. State***, 93 Wis. 2d 682, 688, 287 N.W.2d 774 (1980). "The determination of relevancy can never be an exact science because it necessarily involves the trial court's considered judgment whether a particular piece of evidence tends to establish a fact of consequence in a given set of circumstances." ***Pharr***, 115 Wis. 2d at 344. "The issue of relevancy 'must be determined by the trial judge in view of his or her experience, judgment and knowledge of human motivation and conduct.'" ***Id.*** (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." ***Id.*** at 346 (citations omitted). "Relevancy is not determined by resemblance to, but by the connection with, other facts." ***Id.*** (citations omitted).

[4] We note that appellant expressly states in his brief that he is not arguing that this testimony constitutes "other acts" testimony and this court need not address the second and third steps of a ***Sullivan*** analysis. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). The State agrees. Accordingly we do not address it.

¶17 Borrowing from the relevance statute, WIS. STAT. § 904.01, the "fact that is of consequence" in this trial was the identity of the person who shot Adam. The State presented the identification testimony of Adam and his two siblings who said the shooter was Young. Young attempted to rebut that identification through an alibi presented by his mother. Young did not testify himself. Trial counsel challenged the identification further through cross-examination of the State's identification witnesses, Adam, Carl and Beth.

¶18 The State sought to use the one-year shooting anniversary evidence to show Young's motive for shooting Adam—retaliation for the death of his brother from the shooting exactly one year to the day previous—and thereby support its witnesses' identification of Young as the shooter.

¶19 The trial court addressed Young's trial counsel's relevance objection at two points. The first was at a pretrial motion in limine. The second is when it ruled on two specific objections to Adam's direct examination. At the pretrial motion the trial court denied Young's motion to exclude mention of the one-year shooting anniversary, basically saying it was premature until the foundation witnesses had testified. During the pretrial argument, Young's trial counsel told the court that the statements that the State's witnesses had given prior to trial did not clearly prove what the motive for Adam's shooting was. The State argued that it wanted the chance to hear the witnesses' testimony at trial to see if a proper relevance connection could be made. The trial court agreed. On appeal Young does not seem to argue that the denial of the pretrial motion was error, but rather uses it to suggest that the trial court's later evidentiary ruling on two objections was error.

¶20 Trial counsel first objected to the shooting anniversary testimony during Adam's direct examination. The prosecutor had just established that Young's brother Wendall had been Adam's friend. Then the prosecutor asked Adam: "Mr. Watson was killed the year before you were shot?" Before Adam answered, trial counsel objected saying "I'm going to object to this line of questioning." The trial court stated, "Overrule at this point." Trial counsel said nothing more.

¶21 The second objection came after the next four questions. In the first question, the prosecutor repeated the anniversary question: "Mr. Watson the defendant's brother was shot and killed a year before you were shot, right? This time, Adam answered, "yes." The prosecutor then asked Adam to confirm that the previous year's shooting was on November 10 of 2012. Adam agreed. Next the prosecutor asked Adam if he had any idea why Young would shoot him and Adam answered: "No." Finally the prosecutor asked Adam whether he thought Young blamed him for his brother's death. At that point trial counsel objected for the second time, saying: "I'm going to object. It calls for speculation." But before the trial court could rule, Adam answered, saying: "Not to my knowledge."

¶22 Young argues that the evidence objected to is not relevant: "Because there was nothing of significance to connect the shootings, the evidence did not serve to make any fact more or less probable than without the evidence." In addition to arguing there was no connection between the two shootings exactly one year apart, Young seems to be arguing that the evidence is not relevant because it was not strong enough and was merely circumstantial. But it is well established that the weight of evidence is a matter for the jury to decide, *see* ***Whitaker v. State***, 83 Wis. 2d 368, 377, 265 N.W.2d 575 (1978) (credibility of witnesses, including defendant, and the weight of the evidence are exclusively for

the trier of fact), and that circumstantial evidence is permissible and may be "stronger and more satisfactory than direct evidence." ***State v. Johnson***, 11 Wis. 2d 130, 135, 104 N.W.2d 379 (1960).

¶23 Contrary to Young's contention, we conclude that the shooting of November 10, 2012, and November 10, 2013, are connected in several ways. First they occurred on exactly the same date. Adam was a witness at one and the targeted victim of the other. There was evidence that the person who committed this crime specified that he was looking for Adam and did not pull the gun out and start shooting until Adam appeared, and the evidence was that the shooter pointed the gun directly at Adam. The victim of the first shooting was the brother of the alleged shooter in the second. Those connections demonstrate the relevance as to the identity and motive of the person who shot Adam. *See* ***Pharr***, 115 Wis. 2d at 346 (relevancy determined by "the connection with[] other facts").

¶24 A reasonable judge could reach the conclusion that the overlapping facts between the two shootings made the fact of Young's motive and identification as the 2013 shooter "more probable … than it would be without the evidence," *see* WIS. STAT. § 904.01, and "shed … light on the subject of inquiry." *See* ***Rogers***, 93 Wis. 2d at 688. While those facts are not *direct* evidence of motive and identity, that is not required to meet the relevance admissibility standard. The one-year shooting anniversary evidence is relevant as long as it "tends to prove a material issue," and it "is relevant, even though it is only a link in the chain of facts which must be proved." *See* ***Pharr***, 115 Wis. 2d at 346 (citation omitted).

¶25 The interconnection between the two events is great enough for a trial court to draw a reasonable inference that the date and overlapping

relationships are not just coincidence. The standard is "any" tendency that the evidence would "shed any light on the subject of the inquiry." *See* WIS. STAT. § 904.01; *see also* ***Rogers***, 93 Wis. 2d at 688. Therefore, the record supports the trial court's decision to admit evidence of the shooting anniversary as a proper exercise of its discretion.

C. The evidence was not unduly prejudicial.

¶26 Young also argues that even if the evidence is relevant, it was error to admit it because its "probative value is substantially outweighed by the danger of unfair prejudice[.]" *See* WIS. STAT. § 904.03. Trial courts are given "broad discretion" in applying this balancing test to an evidentiary question. *See* ***Nowatske v. Osterloh***, 201 Wis. 2d 497, 503, 549 N.W.2d 256 (Ct. App. 1996).

¶27 Young argues that the evidence of a sibling's homicide is the type of evidence that "causes a jury to base its decision on something other than the established propositions in the case," *see* ***State v. Jackson***, 216 Wis. 2d 646, 667, 575 N.W.2d 475 (1998). He argues, "Few things could arouse an emotional response in a jury, or cause it to base its decision on something other than the established propositions in a case, more so than the homicide of a sibling." His argument is essentially that though the anniversary evidence itself proves nothing, it is so emotionally powerful that if a jury hears it, the jury will improperly conclude that it establishes motive and base the verdict on that alone—"something other than the established propositions in a case." Young argues that "no motive was ever established, only a tenuous connection at best because of the dates of the shootings."

¶28 It is axiomatic that "nearly all of the evidence presented by a prosecutor in a criminal trial will be prejudicial to the defendant to the extent that it will tend to convince the jury of his guilt." ***Bailey v. State***, 65 Wis. 2d 331, 352, 222 N.W.2d 871 (1974). In light of the balancing test required by the rule, however, we conclude that it was not erroneous for the trial court, in its "broad discretion," to conclude that the danger of unfair prejudice did not outweigh the probative value.

¶29 First to the extent that Young's argument is that a reference to a "sibling's homicide" emotionally sways a jury and that therefore "[t]his emotionally laden testimony should not have been submitted to the jury," we note that here the emotional content favors Young, not the State. Because the sibling is Young's, that reference could work to his benefit, creating the jury's sympathy for his loss. And beyond that point, Young's argument does not account for other "established propositions" present in this case on which he agrees the jury may properly rely. *See* ***Jackson***, 216 Wis. 2d at 667. The State did present evidence that the shooter specifically asked for Adam by name at the door; that Adam and Young had known each other for several years; that Adam identified Young as the shooter right away at the scene and later to the police; and that two other eyewitnesses identified Young as well. These facts make the earlier nexus so highly probative that it was reasonable for the trial court to conclude that the danger of unfair prejudice did not outweigh it.

D. The record does not reflect that the trial court based its evidentiary decision on a mistaken view of the evidence.

¶30 A decision grounded on a mistaken view of the evidence is an erroneous exercise of discretion. ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 659, 511 N.W.2d 879 (1994).

¶31 Young argues that the trial court based its pretrial decision on his motion to exclude the one-year shooting anniversary evidence on the mistaken belief that "the scene would be completed by some evidence that Mr. Young held [Adam] responsible in some way."

¶32 After reviewing the transcripts from that ruling, we conclude that the trial court did not misunderstand the state of the evidence. Trial counsel directly informed the trial court before its ruling that the only evidence was that the shooting victims did not know why it happened. In multiple places, the trial court indicated that it understood that no offer of proof had been made that the witnesses were going to testify that Young blamed Adam for the 2012 death. When the trial court ruled on the admissibility of such testimony, it stated, "[I]t's not the sort of thing that I can preclude the State's going into at all in a motion in limine, because it's dependent on the answer that we're not aware." The trial court also recommended that trial counsel reserve objection for testimony, rather than in advance, "because we don't know what the testimony is going to be." There is no basis in this record for finding that the trial court based its pretrial decision on a mistaken view of the evidence.

E. Even if there was any error, it was harmless.

¶33 The erroneous admission of evidence does not automatically require reversal but rather is subject to the harmless error analysis. ***State v. Britt***, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996). To prove an error harmless, the State must show "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). Factors to be considered in a harmless

error analysis are: the frequency of the error; the importance of the evidence; the presence or absence of corroborating or refuting evidence; whether the evidence duplicated untainted evidence; the nature of the defense; and the nature and strength of the State's case. *See* ***Deadwiller***, 350 Wis. 2d 138, ¶41 (citations omitted).

¶34 Young's argument of error significantly overstates the value of the one-year shooting anniversary evidence to the State. In our review of the objected-to evidence in light of the above harmless error factors, we conclude that they support a finding of harmlessness. First we address the frequency factor. We note that the reference was made, objected to, and permitted only once—by Adam in response to the State's question. Adam confirmed that he was present when Young's brother was shot on November 10, 2012—exactly one year before. Although trial counsel made a second objection to Adam's testimony, it does not support Young's argument of error because the answer Adam gave was actually helpful to the defense. When the prosecutor asked Adam if he thought Young blamed him for Young's brother's death, Adam answered, "Not to my knowledge."

¶35 But it is the nature and strength of the State's other evidence that is the strongest factor supporting harmlessness. The State presented identification of Young as the shooter through the testimony of three eyewitnesses. It is undisputed that Adam and Young knew each other and that Adam had ample opportunity to observe the person who shot him. It is undisputed that Adam told his mother right away at the scene that Young was the shooter. Adam made a consistent identification of Young as the shooter in his police statement. Both Carl and Beth also identified Young as the shooter.

¶36 As to the factor analyzing the nature of the defense case, that too supports harmlessness. Young put in his alibi through his mother. She testified that she spoke to him on the phone during the time of the shooting and that she knew he was calling from a landline in Chicago. Trial counsel attempted impeachment of the identification process the police used with Carl on the photo array. While he attacked these at trial, he does not claim on appeal that there was any legal infirmity in the identification processes used. The defense elicited the fact that Beth did not make an identification from the photo array and suggested that her subsequent in-court identification was untrustworthy.

¶37 The jury was able to hear both sides of the identification/alibi evidence and draw its own conclusions as to who the shooter was. It assessed the witnesses, principally Adam and Young's mother, and drew its credibility determination from them. In the face of the State's evidence as a whole and given Young's opportunities to attack and impeach the State's witnesses and present his own alibi, the reference to the fact that Adam was present at the shooting of Young's brother exactly one year before cannot be said to have persuaded the jury that Young was the shooter. Thus, even if error, it was harmless.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.