COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1084-CR **Cir. Ct. No. 2009CF236**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY A. JAGO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for LaCrosse County: TODD W. BJERKE, Judge. *Affirmed*.

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

¶1 FINE, J. Timothy A. Jago appeals the judgment entered on a jury verdict convicting him of four counts of first-degree sexual assault with the use of a dangerous weapon and one count of false imprisonment, *see* WIS. STAT. §§ 940.225(1)(b), 939.63(1)(b) & 940.30. He also appeals the trial court's order denying his motion for postconviction relief. Jago contends that: (1) his trial

lawyer gave him constitutionally deficient representation; (2) the trial court erroneously exercised its discretion when it denied his motion asking for a mistrial; and (3) the real controversy was not fully tried. We affirm.

I.

¶2 In April of 2009, Jago's wife told him she wanted a divorce. They had two children, a son who was then sixteen years old and a daughter who was then twelve. A few days later, at bedtime, Jago asked if they could have sex for "old times sake." According to Mrs. Jago, she repeatedly said no until Jago pulled out a gun, pointed it at her, cocked it, and threatened to kill her. She then obeyed his command to "get naked," after which, he forced her to give him oral sex, he forced oral sex on her, and put his fingers in her vagina and anus. This took about two hours. Mrs. Jago told police that the day after the assault Jago called her at work to apologize, blamed his drunkenness for his actions, and told her that "he has only pointed a gun at two people; her and a man he killed in Illinois." Jago told police in a recorded interview that when his wife turned down his request for "a last little fling," he took out his gun, pointed it at the ceiling and cocked it, after which his wife willingly agreed to the sex acts. Jago said the handgun was not loaded at the time, but said that his wife did not know that until later.

¶3 Jago said his wife gave him oral sex, then he gave her oral sex, and that he put his fingers in her vagina and anus. He also said that he was drunk because, he said, he had been drinking alcohol all day. When the police officer asked Jago why he picked up the handgun, he said he wanted to scare his wife by putting the gun to his head and pulling the trigger, and also to show her you cannot kill yourself with an unloaded weapon. Jago admitted that he "knew [his wife] would take [picking up the gun] as a threat." The day after the assaults, Jago left

town and his wife went to work. Mrs. Jago called her son and told him to gather and hide all the guns in their home. The Jagos' son found a loaded handgun on his dad's side of the bed.

¶4 When Mrs. Jago testified during the trial, the prosecutor asked her:

> Q Did he mention anything in his phone calls about apologizing for calling you stupid or stopping the sex?
>
> A He just apologized for the act. I don't remember him specifically apologizing for anything. At one point in the phone call, um, that I did take in that morning, I said, Tim, you used a gun, and I don't know what to do with that, and he said, I've only pointed a gun at two people in my life and the other one is dead.

¶5 Jago's trial lawyer objected and, without the jury present, explained to the trial court that he had an agreement with the prosecutor that Jago's "pointing a gun" statement would not be used at trial because it referred to an incident from 1973 where Jago acted in self-defense. Jago's trial lawyer argued that this information "is very inflammatory and prejudicial" and asked for a mistrial.

¶6 The prosecutor responded:

> Well, your Honor, it's accurate that I agreed to keep it out, didn't seek to bring it in. I wasn't expecting that answer to that question. However, I would say that I'm not sure it is so prejudicial. I agreed to keep it out because [Jago's trial lawyer] didn't want it in, but basically in 1973 he was involved in a shooting where he was acting in self-defense, was not convicted of a crime. Because it was so long ago and he did nothing wrong, I don't know that it does prejudice him in any way. I think the witness brings it out only to explain, when he makes that comment, he's talking about perhaps hurting her like he hurt somebody else. I propose either allowing us to explain to the jury what that's about, or if [the defense] doesn't want that, a cautionary instruction that they're to disregard any reference of him being involved in some other incident.

The trial court denied the motion for a mistrial, and, instead, found that any error could be cured by striking the statement from the Record and instructing the jury "to disregard that last statement, and there will be no evidence presented to show that Mr. Jago committed any such acts attributed to him in that statement at any time in the past, and that statement furthermore is irrelevant when you consider the evidence that you are to consider in this trial during your deliberations." The trial court then instructed the jury:

> Ladies and gentlemen, before you went out on your break, there was an objection. I have sustained that objection. I'm going to strike the last answer. You are to disregard that last statement, and there will be no evidence presented to show that Mr. Jago committed any such acts attributed to him in that statement at any time in the past, and that statement furthermore is irrelevant when you consider the evidence that you are to consider in this trial during your deliberations.

The trial court further found that the statement was not other-acts evidence: "I see this as a statement made purportedly by the defendant to explain his state of mind at the time of the offense, and it was made very close in time to the time of the offense so it's a completely different issue."

¶7 Jago's trial lawyer also objected to Mrs. Jago's testimony about finding Jago with the gun on New Year's Eve of 2009:

> Q [by the prosectuor] Prior to April 19th of 2009 was there a time shortly before that when you found your husband with a gun in the house?
>
> A Yes, New Year's Eve, 2009.
>
> ….
>
> Um, he was drinking excessively and to the point where he couldn't stand up when he was walking down the hallway. As a family, we just kind of avoided him and tried not to -- just stayed in a different part of the house. Later on, he came up to

> bed. He was laying on the bed, and the gun was sitting on his -- he was sleeping, um, and the gun was laying on his chest so I took the gun and the bullets that were on the nightstand and hid them in the basement.
>
> Q Did he become angered by this later?
>
> A The next morning when he woke up the first thing he said to me is, where is the gun, and I said, I put it away, and he said, why'd you do that. I said, I was afraid you were going to hurt yourself; you were really drunk; you were playing with it; it was scary, and he said, you should be more concerned I would hurt you or your mother than that I'd hurt myself.

Jago's lawyer objected, but the trial court overruled the objection:

> Your objection is overruled. That doesn't imply a threat. If he's drunk and manipulating a weapon and it accidentally goes off, she should have been more concerned it -- might hurt her or her mother rather than himself. That's the way I heard it. I didn't hear a threat in there. So, your objection is overruled.

¶8 Jago testified in his own defense. The defense theory was his sex with his wife was consensual, and that she lied about not consenting because a conviction would give her potential financial benefits in the pending divorce case.

¶9 Jago testified that he had never been convicted of a crime. During his testimony, Jago's trial lawyer asked him about threatening his wife:

> Q There was discussion about seeing you with an unloaded gun on a prior occasion. Did you make any threats on that occasion?
>
> A No, sir.
>
> Q Did you ever threaten to use a weapon on your wife?
>
> A Not that I know of.
>
> Q Never made any verbal statements to that effect?

A No, sir.

Jago testified that his wife consented to the sex acts before he picked up the gun, that it was his "intention … to pick it up, cock the hammer, put the gun to my head, pull the trigger" "to show her how effective suicide with an empty gun is," but instead, he "kind of froze," and as he "was pointing the gun at the ceiling" Mrs. Jago said "Tim, put the gun down." Jago testified he did what she asked and they had consensual sex.

¶10 The State then called Mrs. Jago in rebuttal and asked if Jago had "ever threatened [her] before April [2009]?" Jago's trial lawyer objected that this question "invite[ed] evidence of prior acts" that they agreed not to bring up. The prosecutor responded: "Until he testified he's never forced her before, he never threatened her before. She can rebut that." The trial court agreed the State could ask these questions, and Mrs. Jago testified:

Q Did Mr. Jago ever threaten you prior to April 19th?

A Yes, he had.

Q In what way would he threaten you?

A He actually threatened to kill me with two knives.

Q When did that happen?

A A year and a half ago when I stopped -- when we -- our marriage was over was because he, um, he was very, very drunk, and he wanted to drive my children to school, and I said he was too drunk to drive, and he came at me, started hitting me, and our son, … came out into the kitchen and told him to stop, and [Jago] grabbed two butcher -- or two knives out of the butcher block and said, what, are you afraid I'm gonna kill you, and I said -- didn't say much of anything, and [our son] was between us, and [Jago] took the knives, threw them in the garbage, and went outside, went downstairs. I heard a loud crash. I didn't know necessarily what that was, and he left. I proceeded to go downstairs

and saw my son's base. He had just crashed it against the pool table.

Q Base guitar?

A Base guitar, and I knew that day that, if my son was gonna step between us and it was gonna be violent, that I did not want -- belong in that home anymore and neither did my children.

….

Q Had he forced you to perform sex acts that were described today prior to April [2009]?

A Yes, he has.

Q Had you ever consented to any of those acts?

A No, never, never. He never used a gun before, but he's a bigger man than I am.

….

Q The incident that happened [with the knives], did you report that to the police?

A I did not.

Q Why not?

A Because we had a similar incident in Minnesota where I did, and when I did, um, the police got very involved in our life, and my two children were very damaged by it, and I had made a promise to the family I wouldn't involve the police like that again.

Q Until now?

A Until now, and it took me a whole day to call the police and report this because I just -- once I hand it to someone else, it was out of our control, and that scared me.

¶11 The State also called the Jagos' son, who was then eighteen, in rebuttal. He testified:

Q …. [H]ave you ever seen your father, Tim, threatening your mother?

A Yes, sir.

Q Can you describe when and how that happened?

A Um, it's happened various times. The most vivid in my memory would be …. There was an incident in our kitchen … involving a butcher knife and threats towards my mother.

Q Why don't you tell us what happened.

A Um, he had been drinking that morning … my mom thought he was too drunk to drive us, and he didn't want her to drive … and then the fight kind of escalated from there.

Q What happened next?

A He grabbed a butcher knife or one of the knives from a cutting block, I forget which one exactly, and … advanced toward my mother.

Q What did you do?

A I stood up and objected. I didn't really feel like I could have done much, and then after that, he put the knife down and left the room as far as I remember.

….

Q Do you remember a time when he broke one of your guitars?

….

A There had been an argument of some sort, and I took my mother's side, and he left the house, and on his way out, um, grabbed one of my guitars and smashed it over the pool table.

¶12 Then, the prosecutor asked whether he had ever heard his father physically hurting his mother, and the son said that he had:

A I heard yelling. I heard her screaming, and I heard somebody hitting the floor or I heard somebody falling.

> Q Did you ever see any injuries on your mother after that?
>
> A Yes sir.
>
> Q What did you see?
>
> A Bloody eye and I believe bruising around the eye.

¶13 As noted, the jury found Jago guilty. In his postconviction motion, he argued that his trial lawyer gave him ineffective assistance when he: (1) did not file a motion *in limine* to exclude other-acts evidence; (2) opened the door to inadmissible other acts; (3) did not object to the other-acts evidence introduced during the State's rebuttal; and (4) did not attack the victim's credibility by asking her about her medical condition and prescription medications that the postconviction motion treated her alleged hypoglycemia, anxiety, and migraine headaches. He also argued that the real controversy had not been tried because the jury heard about "prior bad acts that should not have been admitted."

¶14 After repeated delays related to the health of Jago's trial lawyer, the trial court held a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (hearing to determine whether lawyer gave a defendant ineffective assistance). At the ***Machner*** hearing, Jago's trial lawyer testified that:

- He specifically chose not to use medical evidence to attack the victim's credibility because it conflicted with the chosen theory of defense—that she had a financial motive, related to the divorce, to lie; because Jago's recollection on the medical events "predated these matters by … a very significant period of time"; because medical experts the trial lawyer consulted considered this line of questioning "speculative"; and because attacking the victim with the

medical evidence on top of the chosen defense theory might make her the "walking wounded" and "more sympathetic" to the jury.

- "[W]e had a fairly cooperative arrangement with the district attorney's office. We had significant discussions about areas of potential other acts, as to what would be introduced and what would not be introduced, and for certainly significant parts of the trial those agreements certainly were honored."

- He met with the prosecutor and police witnesses to make sure the other acts evidence would not be admitted.

- He did not believe a formal motion to exclude other acts necessary because he had a stipulation "not just from some new assistant district attorney, from the District Attorney who[m] I had experience with and was known to be a professional and honorable attorney, and I felt there was no lack of clarity in regard to it."

- He did not know about the New Year's Eve pistol incident before the trial and when he asked the prosecutor why it had not been disclosed, and the prosecutor said he did not know about it either.

- He did not object to some objectionable questions because his "experience in trying cases that there becomes, in terms of the effect on the jury, often times of diminishing returns from objections, that it can be seen sometimes as somebody trying to hide something, or being annoying and argumentative, and I thought we were not real far ahead in the likability stakes at that point." "I specifically recall [whether to object] being a delicate balance."

- His "use of the words ever or never are probably … not the choice of words that would have been best," and asking Jago these questions "ran that risk" of "opening the door" but felt "the need to have, have him at least rebut" the victim's testimony.

- "And even, even as to the extent that it did open the door, there still was something very important about him denying that he would threaten her with weapons" to show "their relationship as being a mutually volatile series of activities."

- He discussed with Jago "the idea of the shotgun approach, where you throw everything you can up against the wall and see if something sticks, as opposed to a more focussed [*sic*] approach as to picking a strategic approach to how you want to persuade somebody about something, and that certainly that I lean towards a more targeted approach."

The trial court ruled:

- "[T]he other acts evidence the State presented would have been admissible under Wis. Stat. Sec. 904.04(2)(a) to show Jago's intent and an absence of mistake," and therefore "Jago's trial counsel was not ineffective for failure to keep [the other-acts evidence] out."

- Moreover, Jago did not prove that admission of the other-acts evidence prejudiced him: "During his testimony, Jago came across as overbearing and difficult for his trial counsel to control. In a case that c[a]me down solely to whether the jury believed the victim or the Defendant, Jago was not a very sympathetic witness. Assuming

that the other acts evidence was inadmissible and that the State should therefore not have been allowed to call any rebuttal witnesses, the Court's confidence in the outcome of the trial would not be undermined in the least."

- Jago's trial lawyer's strategic decision to not introduce evidence that the victim's medical condition "impaired her thinking and, therefore, her ability to perceive and recall events" was objectively reasonable because the trial lawyer believed it would contradict the chosen defense that the victim "was fabricating the assault in order to position herself to gain financially from the upcoming divorce."

- Further, Jago could not show prejudice because he "would have been unable to prove with any degree of certainty that the victim was hypoglycemic or under the influence of her medications at the time of the alleged assault." "[T]he victim hid from [Jago] much of her medical conditions and their treatment" making this evidence "speculative and indefinite" and of "little persuasive value."

- Jago's real-controversy-not-tried argument depends upon the other-acts and medical-condition evidence and because those have been rejected, there is no merit to his claim that the real controversy was not fully tried.

¶15 We now turn to Jago's appellate contentions.

II.

A. Alleged Ineffective Assistance.

¶16 As we have seen, Jago argues his trial lawyer gave him deficient representation because his trial lawyer: (1) should have filed a motion *in limine* to exclude other-acts evidence instead of relying on the informal agreement he had with the prosecutor; (2) inadvertently opened the door for other-acts evidence to come in on rebuttal; (3) did not sufficiently object when the other-acts evidence came into evidence; and (4) should have attacked the victim with her medical condition and medication use to tarnish her credibility.

¶17 In order to show constitutionally ineffective representation, Jago must show: (1) deficient representation; and (2) resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, he must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance," *see* ***id*** at 690**.** Further, "strategic decisions by a lawyer are virtually invulnerable to second-guessing." ***State v. Westmoreland***, 2008 WI App 15, ¶20, 307 Wis. 2d 429, 439, 744 N.W.2d 919, 924. In order to prove resulting prejudice, he must show that his lawyer's errors were so serious that he was deprived of a fair trial and reliable outcome, *see* ***Strickland***, 466 U.S. at 687. Thus, "[t]he defendant must show that there is a reasonable probability that, but for lawyer's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. This is not, however, "an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the

trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379, 386 (1997) (citations and quoted source omitted).

¶18 We do not need to address both ***Strickland*** aspects if a defendant does not make a sufficient showing on either one. *See* ***id.***, 466 U.S. at 697. Our review of an ineffective-assistance-of-counsel claim is mixed. ***State v. Ward***, 2011 WI App 151, ¶9, 337 Wis. 2d 655, 663–664, 807 N.W.2d 23, 28. "A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. Its legal conclusions as to whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review *de novo*." ***Ibid.*** (internal citation omitted). Finally, a defendant is not entitled to an evidentiary hearing on ineffective assistance of counsel claims unless "the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 580, 682 N.W.2d 433, 439.

1. *Motion in Limine*.

¶19 Jago contends his trial lawyer should have filed a motion *in limine* to exclude other-acts evidence instead of relying on his informal agreement with the prosecutor, and his failure to do so allowed the jury to hear about his statement that: "he has only pointed a gun at two people; his wife and a man he killed in Illinois."

¶20 As we have seen, Jago's trial lawyer got the prosecutor to agree to keep this statement out of evidence. He made this agreement with a prosecutor with whom he had a good relationship and knew to be trustworthy and honest. The prosecutor kept the agreement and did not solicit the gun statement from

Mrs. Jago. Under these circumstances, *not* making a formal motion is not deficient performance.

¶21 Further, as the trial court found, the gun statement was *not* other-acts evidence. Rather, it was a statement by a party opponent and would have been admissible. *See* WIS. STAT. RULE 908.01(4)(b)1 (a "party's own statement" is admissible when the "statement is offered against a party."). So, if his trial lawyer had filed a formal motion *in limine* to try to exclude this statement, it would not have been excluded, unless the evidence was excludable under WIS. STAT. RULE 904.03, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Under the circumstances as revealed by the trial testimony the probative value of the evidence was not by any stretch of the imagination "substantially outweighed by the danger of *unfair* prejudice." (Emphasis added.) Thus, Jago cannot show ***Strickland*** prejudice. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406, 416 n.10 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance."). Moreover, as we have seen, the trial court struck the statement from the Record in an abundance of caution and instructed the jury not to consider it. We presume juries follow instructions given. *See* ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759, 768 (1994).

2. *Opening the door to other-acts evidence.*

¶22 Jago next claims his trial lawyer gave him deficient representation when he asked questions during direct examination about whether he had *ever*

threatened his wife, and this allowed the State to call rebuttal witnesses to testify about other times he did threaten his wife. The trial court found that this did not prejudice Jago because the prior acts were admissible under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). We agree.

¶23 WISCONSIN STAT. RULE 904.04(2)(a) controls when other-acts evidence may be admitted:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

¶24 We apply a three-part test to determine if "other-acts" evidence should be admitted: (1) whether the evidence is offered for a permissible purpose under RULE 904.04(2); (2) whether the evidence is relevant under WIS. STAT. RULE 904.01; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay, *see* WIS. STAT. RULE 904.03. *See* ***Sullivan***, 216 Wis. 2d at 772–773, 576 N.W.2d at 32–33.

¶25 Here, the other acts went directly to show Jago's motive in having and handling the gun on the night of the assaults. Further, they were evidence that Mrs. Jago did not consent, as Jago contended. Thus, the other acts could have been offered for a permissible purpose and were clearly relevant. Finally, the other acts were not *unfairly* prejudicial—they went to the heart of Jago's defense theory that his wife consented to the sex. Thus, "opening the door" did not prejudice Jago.

3. *Insufficient objections to other-acts evidence*.

¶26 Jago also argues that his lawyer should have kept objecting throughout the State's rebuttal and that not doing so was ineffective assistance. We disagree.

¶27 As we have seen, during rebuttal, when the prosecutor asked Mrs. Jago about other threats, Jago's lawyer objected. The trial court overruled the objection. At the ***Machner*** hearing, Jago's trial lawyer explained why he did not keep objecting: because his "experience in trying cases that there becomes, in terms of the effect on the jury, often times of diminishing returns from objections, that it can be seen sometimes as somebody trying to hide something, or being annoying and argumentative, and I thought we were not real far ahead in the likability stakes at that point." "I specifically recall [whether to object] being a delicate balance."

¶28 Once the trial court made clear that the other acts were coming in, *not* objecting to every question was reasonable strategy. The other-acts evidence had already been preserved for appellate review, *see* ***State v. Kutz***, 2003 WI App 205, ¶27, 267 Wis. 2d 531, 553, 671 N.W.2d 660, 671 ("A definitive pretrial ruling preserves an objection to the admissibility of evidence without the need for an objection at trial, as long as the facts and law presented to the court in the pretrial motion are the same as those that arise at trial."). Moreover, we agree with Jago's trial lawyer that, as he put it, "it can be seen [by the jury] sometimes as [the lawyer who's objecting] trying to hide something." Jago's lawyer strategic decision to not object was not deficient representation.

4. *Attacking victim's credibility with medical condition and medication use.*

¶29 Jago contends that his trial lawyer gave him ineffective assistance by not using his wife's medical condition and prescription medications to attack her credibility. According to Jago, his wife had hypoglycemia, anxiety, and migraine headaches, and took several medications to treat these conditions. He claims that hypoglycemia and the medications both had side effects that could impair her thinking and her ability to accurately perceive and recall events.

¶30 Jago's trial lawyer testified at the ***Machner*** hearing listing several reasons why he strategically decided not to use the medical evidence to impeach Mrs. Jago:

(1) Using this medical evidence contradicted and would undermine the defense theory. He was portraying the victim to the jury as consciously manipulative—a woman who was intentionally lying about what happened to gain a financial advantage in the pending divorce.

(2) He also feared doing so would make the victim look like the "walking wounded" and appear more sympathetic. And, in a case where it was Jago's word against hers, that would not be helpful.

(3) He does not favor "the idea of the shotgun approach, where you throw everything you can up against the wall and see if something sticks, as opposed to a more focused approach as to picking a strategic approach to how you want to persuade somebody about

something, and that certainly that I lean towards a more targeted approach."

(4) He had consulted several medical providers who told him the medical condition theory involved too much speculation, and the information Jago had given him on his wife's medical condition/medication was not current.

¶31 Jago argues that the medical evidence could have been used to "support and enhance" the original defense theory and would not necessarily have contradicted or undermined the defense. Jago's trial lawyer's "targeted approach" was strategy well founded on the evidence, and was not by any means deficient representation.

B. Mistrial.

¶32 Jago argues that the trial court should have granted his motion for a mistrial when Mrs. Jago told the jury that he said: "I've only pointed a gun at two people in my life and the other one is dead."

¶33 Whether to grant a mistrial lies within the sound discretion of the trial court. ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 317, 659 N.W.2d 122, 134. "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Ibid.*** Not every error requires a mistrial, and it is preferred to use less drastic alternatives. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695, 702 (Ct. App. 1998). As with all discretionary determinations, we will affirm the trial court if it "examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." ***State v. Bunch***, 191 Wis. 2d 501,

506–507, 529 N.W.2d 923, 925 (Ct. App. 1995). We also may independently review the Record to determine if it supports what the trial court did. *See* ***State v. Davidson***, 2000 WI 91, ¶53, 236 Wis. 2d 537, 565, 613 N.W.2d 606, 619.

¶34 The Record here amply supports the trial court's decision to deny the request for a mistrial. The trial court determined any error could be corrected by striking Mrs. Jago's answer and giving a curative instruction. As noted above, we presume the jury followed the instructions given. *See* ***Johnston***, 184 Wis. 2d at 822, 518 N.W.2d at 768. Further, as also discussed above, the objected-to statement could have been admitted as a statement by a party opponent under WIS. STAT. RULE 908.01(4)(b)1, and was not inadmissible under WIS. STAT. RULE 904.03. The trial court did not erroneously exercise its discretion in denying Jago's motion for a mistrial.

C. Real Controversy.

¶35 Jago claims finally that the "real controversy" has not been fully tried "because the jury heard repeated references to inflammatory and irrelevant collateral allegations and did not hear about the victim's hypoglycemia and use of prescription medications that would have undermined her credibility." (Uppercasing omitted.) We disagree. This contention is merely a rehash of his other arguments that we have already rejected. *See* ***State v. Arredondo***, 2004 WI App 7, ¶56, 269 Wis. 2d 369, 405, 674 N.W.2d 647, 663–664 (Ct. App. 2003).

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.