COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1595-CR **Cir. Ct. No. 2011CF141**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CODY LEE CROMWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: CRAIG R. DAY, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Cody Lee Cromwell appeals a judgment of conviction for strangulation/suffocation and misdemeanor battery, both as a repeater. He argues that the trial court erroneously exercised its discretion in allowing the jury to hear recorded phone calls he made from the jail and by

sending the victim's written statement to police into the jury room. He also requests a new trial under WIS. STAT. § 752.35 (2011-12),[1] on the ground that the real controversy was not fully tried. We affirm the judgment.

¶2 On August 6, 2011, police were called to investigate a potential domestic disturbance and found Cromwell walking near by. He told the responding officer that he called the police because his girlfriend, T.S., had struck him in the back of the head and scratched his face. T.S. told police she had called them after a fight with Cromwell in which he struck her twice and placed his hands around her neck. Later that same day, T.S. gave a written statement to police indicating that the fight ensued over Cromwell's accusation that T.S. had cheated on him and that Cromwell had struck and strangled her.

¶3 On August 8, 2011, two days after her written statement, T.S. recanted and said that she had struck Cromwell twice in the face and that only after that had Cromwell hit her and placed his hands around her neck. At the preliminary hearing held August 25, 2011, T.S. denied that her written statement was accurate. She testified she had started the fight with Cromwell and that she hit him. She denied that Cromwell hit her, placed his hands around her neck, or harmed her in any way.

¶4 Before trial, Cromwell moved to prohibit the admission of the recorded jail phone calls on the grounds that the speakers were not identified and the probative value of the evidence was outweighed by the prejudice arising from references to Cromwell's status as a probationer or being incarcerated and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Cromwell's angry outbursts and foul language during the calls. The court ruled that large portions of calls made by Cromwell to T.S. were admissible.[2] It specifically rejected Cromwell's contention that the probative value was outweighed by the anger demonstrated in the phone calls because Cromwell's anger and aggression toward T.S. were relevant to T.S.'s recantation.

¶5 At the jury trial, T.S. testified that she scratched Cromwell and when he refused to leave, she called the police and made up the accusation that he had hurt her. She testified that her injuries noted on the domestic abuse worksheet were self-inflicted by biting her lip and rubbing her hands and a towel against her neck. The excerpted recorded phone conversations[3] were played and T.S. acknowledged her participation in the conversations. In the conversations, Cromwell instructed T.S. to contact police and say she lied about the incident. In one conversation Cromwell had T.S. repeat to him certain elements of the statement that he gave to police so the stories would be consistent. In a couple of the conversations T.S. made reference to Cromwell hitting her first, or that it did not happen the way Cromwell was saying. Other testimony established that the recorded calls were made between August 7 and 14, 2011, with two made on August 7, 2011, and five on August 8, 2011, albeit not all to the same person.

¶6 After the jury left for deliberations, the trial court considered which, if any, exhibits should go back to the jury room. The trial court indicated that it would not send back any exhibits unless the jury asked for them. It commented

[2] At trial, T.S. identified the recordings as conversations between herself and Cromwell.

[3] References to Cromwell's probation status, revocation proceeding, need for help with anger management, and fear of multi-year incarceration were excised from the recordings.

that to send T.S.'s written statement to police and the domestic abuse worksheet back would "unduly emphasize [T.S.]'s initial statement" because there was no exhibit reflecting her subsequent and recanting statements. The jury requested T.S.'s written statement. The statement was provided to the jury over Cromwell's objection. The trial court explained that despite its earlier impression that sending the statement to the jury was a close call, it no longer was because it was evidence the jury was asking for and it did not contain inappropriate content.

¶7 On appeal Cromwell argues that he was deprived of a fair trial because the recordings of the phone conversations with T.S. were unduly prejudicial evidence. Specifically, he contends the evidence allowed the jury to repeatedly hear that he was a jail inmate[4] and to hear him use an angry or aggressive tone and offensive language.

¶8 Under WIS. STAT. § 904.03 relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice ...."

> [U]nfair prejudice results where the proffered evidence … would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

State v. Mordica, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). The determination of whether relevant evidence should be excluded for the reason of unfair prejudice is within the trial court's discretion. ***State v. Hinz***, 121 Wis. 2d

[4] Each phone call began with a recorded message from the jail phone system indicating that a jail inmate was calling.

282, 285, 360 N.W.2d 56 (Ct. App. 1984). We will not find an erroneous exercise of discretion if any reasonable basis exists for the decision. ***State v. Plymesser***, 172 Wis. 2d 583, 591, 493 N.W.2d 367 (1992).

¶9 Although a balancing test is required under WIS. STAT. § 904.03, ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983), the trial court did not explicitly address the probative value of the evidence. Cromwell does not address the probative value of the evidence and does not contest the State's assertion that the probative value of the evidence "was extremely high." We start with the acknowledgement that the probative value was extremely high.[5] *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (that which is not refuted is deemed conceded).

¶10 Cromwell argues that the nine repeated references to his status as a jail inmate undermined the presumption of innocence. *See* ***State v. Kourtidias***, 206 Wis. 2d 574, 586, 557 N.W.2d 858 (Ct. App. 1996) (repeating the caution that there are few instances where informing the jury about the defendant's current probation or parole status could be more relevant than prejudicial). The trial court determined that the prejudice stemming from the revelation could be reduced by a curative instruction. Indeed, a curative instruction was given telling the jury not to use the fact that Cromwell was in jail as evidence against him in any way. The instruction served to mitigate potential unfair prejudice, and we presume the jury

[5] "[W]here the trial court fails to set forth its reasoning in exercising its discretion to admit evidence, the appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). We conclude that the record provides a basis for the trial court's implicit determination that the probative value of the evidence was extremely high.

followed it. *See* ***State v. Payano***, 2009 WI 86, ¶99, 320 Wis. 2d 348, 768 N.W.2d 832; ***State v. Hanson***, 2010 WI App 146, ¶24, 330 Wis. 2d 140, 792 N.W.2d 203.

¶11 Cromwell suggests that the angry or aggressive tone and offensive language he used in the conversations could have appealed to the jury's sympathy toward T.S., aroused a sense of horror regarding Cromwell's attitude toward T.S., and provoked an instinct to punish. The trial court acknowledged Cromwell's angry or aggressive tone but could not separate it from the probative value of the evidence itself. In determining whether T.S.'s recantation was truthful or untruthful, the jury was entitled to hear how Cromwell was forceful in his directions to T.S. Thus, the prejudice was not unfair. Again, a cautionary instruction was used and was sufficient to mitigate the potential prejudice related to the profane language. *See* ***Payano***, 320 Wis. 2d 348, ¶99; ***Hanson***, 330 Wis. 2d 140, ¶24.

¶12 We summarily reject Cromwell's suggestion that the evidence was unfairly prejudicial because the prosecution had other means to undermine T.S.'s recantation. No legal authority is cited in support of the proposition that alternative means must be explored and utilized in lieu of evidence that is challenged as unduly prejudicial. We conclude the trial court properly exercised its discretion in admitting the recordings.

¶13 We review the trial court's decision to send T.S.'s written statement to the jury room under the erroneous exercise of discretion standard. *See* ***State v. Anderson***, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by* ***State v. Alexander***, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126. In the exercise of its discretion, the trial court should consider "'whether the exhibit will aid the jury in proper consideration of the case, whether a party will be

unduly prejudiced by submission of the exhibit, and whether the exhibit could be subject to improper use by the jury.'" ***Id.*** (quoting ***State v. Jensen***, 147 Wis. 2d 240, 260, 432 N.W.2d 913 (1988)).

¶14 At the outset, Cromwell's argument on this issue suggests that the trial court reversed its initial ruling not to send the exhibits back and that the reversal on the sole basis that the jury asked for the exhibit was a decision based on an incorrect legal standard. We do not agree that the court reversed itself. Rather, the trial court initially deferred a ruling until the jury requested exhibits. Once that occurred, the matter was within the trial court's discretion.

¶15 In its ruling, the trial court recognized that the jury was requesting something that was evidence in the case and because it did not include any inappropriate content, the jury could make proper use of it. Allowing the exhibit to go to the jury room was consistent with ***Jensen***. In ***Jensen***, the trial court's decision to send a written confession to the jury room over the defendant's objection was upheld as properly grounded in the belief that it would be helpful to the jury to examine a document that had been quoted in fragments at trial. 147 Wis. 2d at 261-62. The ***Jensen*** court recognized that because the content of the confession was not in dispute and credibility was at issue, "[t]he written confession would not necessarily overemphasize the defendant's confession over the defendant's oral denial at trial." ***Id.*** at 262. Although T.S.'s written statement was reviewed with her line by line during her direct examination, it was not read in its entirety to the jury. The content of the statement was not in dispute. The jury heard her recantation of the written statement on both her direct and cross-examination. The trial court's determination that providing the written statement to the jury would not unduly emphasize its content was a proper exercise of discretion.

¶16 The determination that the written statement would not be unduly emphasized by supplying it when requested by the jury is also consistent with ***State v. Jaworski***, 135 Wis. 2d 235, 400 N.W.2d 29 (Ct. App. 1986). ***Jaworski*** teaches that by waiting until the jury makes a request for the statement, the potential for undue emphasis on the written statement is mitigated. ***Id.*** at 243-44. "This is not a case where the jury has been prejudiced by having undue weight placed upon certain evidence by the court; the jury itself considered certain evidence important enough to request it during its deliberations." ***Id.*** at 244.

¶17 Finally, ***State v. Mayer***, 220 Wis. 2d 419, 583 N.W.2d 430 (Ct. App. 1998), illustrates that it is a proper exercise of discretion to grant the jury's request to have a written statement where the statement contains no improper evidence, the trial lasted only one day, and the factual dispute is not complex. ***Id.*** at 424-26. In ***Mayer***, this court rejected the defendant's contention that the possibility that the jury would give more weight to the written statement rather than the oral testimony meant the statement was subject to improper use by the jury. ***Id.*** at 426. Here, as in ***Mayer***, T.S.'s written statement did not include improper evidence, the trial was only one day long, and the disputed issue—T.S.'s credibility—was not complex. As we concluded in ***Mayer***, "it is not a fair inference that the jury based its resolution of credibility issues on the mere fact that it had [T.S.]'s statement before it" during deliberations. *See* ***id.***

¶18 Although the trial court may not have explicitly addressed all three factors outlined in ***Anderson***, a reasonable basis for the decision is reflected by the record. *See* 291 Wis. 2d 673, ¶27. We conclude that the trial court properly exercised its discretion in sending T.S.'s written statement to the jury room after the jury requested it.

¶19 Cromwell seeks a new trial in the interests of justice under WIS. STAT. § 752.35, on the ground that improper use of the recordings and T.S.'s written statement prevented the real controversy from being fully tried. A final catch-all plea for discretionary reversal based on the cumulative effect of non-errors cannot succeed. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992). "Zero plus zero equals zero." ***Id.*** (citations omitted).

By the Court.—Judgment affirmed.

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