

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2547-CR

Cir. Ct. No. 2010CF2338

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE DIAZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Jose Diaz appeals the judgment, entered upon a jury's verdict, convicting him of attempted first-degree intentional homicide and

first-degree reckless injury, both by use of a dangerous weapon. *See* WIS. STAT. §§ 940.01, 939.32, 940.23(1)(a), & 939.63(1)(b) (2009-10).¹ He contends that the trial court erroneously exercised its discretion in allowing Kory Tetley to testify about a stop Diaz made at a custard shop and about Diaz's statement that he was throwing cocaine away. We affirm.

BACKGROUND

¶2 Diaz was charged with two counts of first-degree reckless injury by use of a dangerous weapon. According to the criminal complaint, he attacked his mother-in-law in her garage and another woman who came to her aid. The State subsequently filed an amended information charging him with attempted first-degree intentional homicide and first-degree reckless injury, both by use of a dangerous weapon.

¶3 Trial testimony revealed that Diaz lived in the lower unit of a duplex with his wife, Bianca, their child, and his mother-in-law, Doris Szelagowski. Bianca was Szelagowski's only child. Szelagowski owned the duplex, and she rented the upper unit to two tenants. Szelagowski also owned other rental properties and held life insurance, for which Bianca was the primary beneficiary.

¶4 Szelagowski testified that after Bianca and Diaz got married, they used Szelagowski's credit card from time to time. On April 19, 2010, Bianca and Diaz asked to use her credit card and Szelagowski agreed. They later told Szelagowski that the card would not work. When Szelagowski called the credit card company the next day, she was told that the card was maxed out.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Szelagowski learned that the card had been used to make a large payment for car repairs. Szelagowski blamed Diaz for making the charge. Szelagowski called Bianca's cell phone and left a message telling her that they had to move out. Diaz had Bianca's cell phone when Szelagowski left the message.

¶5 That night, Szelagowski left work around 8:30 p.m. and drove home. She regularly parked her car in a garage near the duplex. The garage was usually kept locked and the upstairs tenants did not store anything in it. When Szelagowski opened the garage door that evening, the light was out. She pulled the car in, closed the door, and got out of the car. Szelagowski last remembered walking in the dark garage. When she awoke, she was in the hospital.

¶6 The second victim, Cynthia Matzinger, also testified. Matzinger was one of the tenants who lived in the upper unit of Szelagowski's duplex. On the night of the attacks, Matzinger was walking home. When she got near the garage, she heard Szelagowski screaming. Matzinger rushed toward the garage, opened the side door, and was immediately struck on the top of the head. She did not see who struck her. Matzinger was hit a couple more times and pushed to the ground. She started to scream and her roommate, Emma Rodomski, came outside. Rodomski called her father first and then 911.

¶7 Rodomski testified she was working at her computer when she heard a wailing sound. She went downstairs to investigate and found Matzinger with blood coming from her head. When Rodomski checked the garage, she saw Szelagowski lying on her back with blood all around her. Rodomski remembered seeing Diaz in the backyard when she returned from getting towels for Szelagowski and Matzinger, before the paramedics arrived. Diaz was carrying his infant daughter.

¶8 A neighbor, Richard Tremarello, testified that on the night of the attacks, he was in front of his house and saw someone who was dressed in white clothing running down the street. The person who was running was carrying a bundle of something, and Tremarello watched to see where the person went. While outside, Tremarello heard a plastic lid being dropped from the dumpster at the business around the corner.

¶9 An officer searched the dumpster described by Tremarello and found a bag containing dark-colored clothing and shoes. A forensic scientist with the crime laboratory testified that blood on the clothing and shoes matched Szlagowski's DNA profile.

¶10 Tetley testified that she and Bianca were long-time friends. On the night of the attacks, she had planned to go bowling with Bianca and Diaz. She received a call from Bianca's cell phone, and it was Diaz telling her that Szlagowski had been attacked. Tetley ran to Szlagowski's home and saw Diaz dressed in a white shirt, white basketball pants, and white socks. Diaz took Tetley to see Szlagowski. Tetley then rode with Diaz when he left to pick Bianca up at work. She wanted to be there when Bianca heard that Szlagowski had been attacked. Tetley thought that Szlagowski might not survive given the nature of her injuries.

¶11 On the way to get Bianca, Diaz stopped at a custard shop. Confused, Tetley asked Diaz why they were stopping, and he told her he had to throw something out. He grabbed something out of the trunk and threw it into the dumpster. Tetley testified that Diaz told her he had to throw out cocaine. They then picked Bianca up and took her to the hospital to see Szlagowski. At the time of the attacks, Tetley had known Diaz for about a year and had never known him

to use cocaine. Police later searched the custard shop's dumpster but did not find anything incriminating.

¶12 Bianca testified that she and Diaz were married in 2008. When the couple moved in with Szelagowski, neither she nor Diaz was employed and they had credit card debt, which Szelagowski paid off. Bianca testified that she and Diaz used Szelagowski's credit card without permission at times. This upset Szelagowski, who had threatened to kick Bianca and Diaz out of her house in the past. Bianca testified that the clothing and shoes found in the dumpster belonged to Diaz.

¶13 The jury subsequently convicted Diaz of both charges. On the attempted first-degree intentional homicide charge, the trial court sentenced Diaz to seventeen years of initial confinement and seven years of extended supervision. On the first-degree reckless injury, the trial court ordered Diaz to serve a consecutive sentence comprised of eight years of initial confinement and three years of extended supervision.

ANALYSIS

¶14 The sole issue on appeal relates to Tetley's testimony regarding the stop Diaz made at the custard shop. A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983) (citation omitted). In determining whether to admit evidence, the trial court considers, as material here, whether the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice." *See* WIS. STAT. § 904.03.

¶15 Prior to his trial, Diaz moved the trial court to preclude Tetley from testifying that he stopped at the custard shop to remove a large amount of cocaine from the trunk of his vehicle and to throw it into a dumpster there. He argued that Tetley's testimony was irrelevant given that no incriminating evidence was ever located, despite a comprehensive search effort by police. Diaz further pointed out that he was not charged with any drug-related activity and that drugs were not relevant to the case. Consequently, he argued that Tetley's testimony implying that he was a cocaine dealer was unduly prejudicial.

¶16 The State disagreed, arguing that Tetley's testimony was relevant. The State explained its theory was that Diaz had gotten rid of some type of weapon—not cocaine—when he stopped at the custard shop. The State asserted that the testimony was not unduly prejudicial given that an officer would testify that the dumpster was searched and no cocaine was found. The trial court agreed with the State and ruled that Tetley's testimony was admissible to show evidence of guilt.

¶17 Here, the trial court considered both the probative value of Tetley's testimony and Diaz's claim of unfair prejudice and found that Tetley's testimony was "highly relevant." The trial court explained: "We do have—I mean the statement—the actions are bizarre given the circumstances. They certainly are highly probative potentially of evidence of guilt." Because no cocaine was found, the trial court concluded that the prejudice was "relatively limited." The trial court indicated that it would consider a limiting instruction explaining to the jury that there was no evidence Diaz had ever been involved with drugs, but Diaz never requested one.

¶18 The trial court gave valid reasons for admitting Tetley's testimony. In doing so, it did not erroneously exercise its discretion.

By the Court.—Judgment affirmed.

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

