COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1155-CR **Cir. Ct. No. 2013CF5018**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY R. LANCASTER,

DEFENDANT-APPELLANT.

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

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Cory R. Lancaster appeals from a judgment of conviction, entered upon a jury's verdict, on one count of second-degree recklessly endangering safety, one count of arson to property other than a building, and one count of attempted mayhem, all as acts of domestic abuse. Lancaster

claims insufficient evidence to support two of the convictions and a confrontation clause violation. We reject Lancaster's claims and affirm the judgment.

BACKGROUND

¶2 In the early morning of November 2, 2013, A.L.D. called police, telling a dispatcher that Lancaster, the father of her child, was going to kill her and had poured bleach in her eyes. The first officer on the scene, Charles Carabelli, entered A.L.D.'s home and found "thick black smoke in the air" and the smell of burning plastic. Believing the incident to be "in progress," Carabelli began a protective sweep of the first floor of the home.

¶3 During the sweep, Carabelli noted something had burned on one of the gas stove's burners. Looking in the sink, he saw a purse and its contents with water poured over them. While sweeping the floor, Carabelli heard a female voice upstairs. He finished his protective sweep of the first floor and went upstairs. He found A.L.D. on the phone, crying, wet, and smelling of bleach. Carabelli thought A.L.D. appeared to be in pain. He finished a sweep of the second floor, then, based on information from A.L.D., went to the basement to see if Lancaster was there. When Carabelli returned to the first floor, A.L.D. was with officer Susan Laroque-Wishowski.

¶4 When Laroque-Wishowski arrived, A.L.D. was soaking wet and sobbing, and indicated she was in a lot of pain. A.L.D. told Laroque-Wishowski that Lancaster had beat her, poured bleach on her, and tried to set her on fire using the stove. A.L.D. also told medical personnel in the emergency room where she was treated that Lancaster had poured bleach on her head and back and pushed her face into a open flame on a gas stove.

¶5 Carabelli had stayed on the scene at A.L.D.'s home for about ninety minutes. He then went to another location and spoke to Lancaster's relatives, but still had not located Lancaster. As Carabelli walked back to A.L.D.'s residence, he found Lancaster walking down the street, wearing a sweatshirt with a large bleach stain. Carabelli arrested Lancaster.

¶6 The State charged Lancaster with first-degree recklessly endangering safety, arson to property other than a building, and attempted mayhem, all as domestic abuse. The recklessly endangering safety charge, which was at some point amended to second-degree, evidently relates to the bleach; the arson was charged because the State believed Lancaster had set fire to A.L.D.'s purse; and the attempted mayhem was charged because, according to the criminal complaint, Lancaster "attempted to mutilate the face of [A.L.D.] by holding her face to the fire."

¶7 The State filed a pre-trial motion to admit A.L.D.'s 911 call and on-scene statements, which the trial court granted. A.L.D. did not testify at trial. At the close of evidence, Lancaster moved to dismiss the attempted mayhem charge for lack of proof of an element, which the trial court denied. The jury convicted Lancaster on all three counts. The trial court sentenced him to two years' imprisonment for both the recklessly endangering safety and the arson convictions, to be served consecutively to each other. On the attempted mayhem conviction, the trial court sentenced Lancaster to ten years' imprisonment, imposed and stayed in favor of six years' probation, with sixty days in jail as a condition. Lancaster appeals.

DISCUSSION

I. Sufficiency of the Evidence: Arson

¶8 "Whoever, by means of fire, intentionally damages any property of another without the person's consent, if the property is not a building and has a value of $100 or more, is guilty of a Class I felony." WIS. STAT. § 943.03 (2013-14).[1] On appeal, Lancaster asserts that there was insufficient evidence of the value of the damaged property to support the jury's guilty verdict.

¶9 Whether the evidence was sufficient to support the verdict is a question of law that we review *de novo*. *See* ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. We defer to the jury and view the evidence in the light most favorable to the State. *See* ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557. We will not substitute our judgment for the jury's unless the evidence presented is so lacking in probative value that no reasonable jury could have found the defendant guilty beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶10 As noted, Officer Carabelli observed a burned purse and its contents in the kitchen sink, doused with water. Lancaster complains that the State failed to present any direct evidence of the items' monetary value, causing the jury to impermissibly speculate: anything a juror "may have seen or heard outside the courtroom is not evidence." *See* WIS JI—CRIMINAL 103.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶11 While the State must prove a defendant's guilt based solely on the evidence offered in the court room, *see* ***State v. Messelt***, 185 Wis. 2d 254, 263, 518 N.W.2d 232 (1994), it would be inaccurate to say that the State offered no evidence of the items' value in this case. There was testimony that what was burned was a Coach purse and a Kindle tablet—specific brand name items with which many members of the jury may be familiar from everyday experience. Moreover, the jury saw photographs of the damaged purse and its contents. The photographs showed the extent of the fire damage to the purse and the tablet, as well as damage to a matching Coach wallet, which was partially melted and scorched; a stove burner, to which pieces of the purse appeared to have melted; and some additional items from inside the purse, like a prescription pill bottle and photos, that were melted and scorched.

¶12 While the State must make its case through the evidence presented, "we expect jurors to bring their experiences, philosophies, and common sense to bear in their deliberations." *See* ***id.*** at 264. We do not conclude, in this case, that the intrinsic value of the damaged property, viewed in its entirety as shown to the jury by the photographs and the descriptions of the items, is so far beyond the ordinary life experiences of jurors that a failure to offer direct evidence of the property's total monetary value as $100 or more constitutes a failure of the State to present sufficient evidence to support the conviction beyond a reasonable doubt.

II. Sufficiency of the Evidence: Mayhem

¶13 "Whoever, with intent to disable or disfigure another, cuts or mutilates the tongue, ear, eye, nose, lip, limb or other bodily member of another is guilty of [the] Class C felony" of mayhem. WIS. STAT. § 940.21. At the close of evidence, Lancaster moved to dismiss the attempted mayhem charge, claiming the

State had not offered sufficient evidence to prove his guilt. Specifically, Lancaster claimed that the State had not shown an intent to disfigure A.L.D. The State responded that there was no other purpose for pushing A.L.D. into the flame. The trial court denied the motion.

¶14 After denying Lancaster's motion to dismiss, the trial court adjourned for a short break. When proceedings resumed, the parties began finalizing the jury instructions. Regarding the attempted mayhem, the State pointed out that an "election" needed to be made, noting that while the information had alleged Lancaster attempted to mutilate A.L.D.'s ear, the evidence from trial was focused on his attempt to disfigure her face. Ultimately, the jury instructions asked the jury to determine whether Lancaster had attempted to disfigure A.L.D. by mutilating her face.[2]

¶15 On appeal, Lancaster changes the focus of his insufficiency argument. He claims now that the information had alleged that he attempted to cut or mutilate A.L.D.'s ear, so his motion to dismiss "challenged the State's proof that he had attempted to injure her ear." He argues that based on the trial court's comments when amending the jury instructions to reference A.L.D.'s face, the trial court believed that the State had not made its case and, thus, should have granted his motion to dismiss. We disagree.

¶16 First, we do not fault the trial court for not considering a theory that was not presented to it at trial. Lancaster challenged only the intent to disfigure element, not the requisite body part element. *See* WIS JI—CRIMINAL 1246.

[2] There is no dispute over whether "face" is encompassed by "other bodily member."

¶17 Second, the trial court appears to have treated the matter as one of amending the charging documents to conform to the evidence adduced at trial. "At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." WIS. STAT. § 971.29(2). Although it does not appear that the State formally moved to amend the information,[3] the trial court did instruct the jury as though the information had been amended. *See* WIS. STAT. § 971.29(3) ("Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby rendered necessary[.]").

¶18 Further, amendment is not permitted if the defendant is prejudiced by the amendment. *See* WIS. STAT. § 971.29(2). "Notice to the defendant of the nature and cause of the accusations is a key factor in determining whether an amended charging document has prejudiced a defendant." *See* ***State v. Neudorff***, 170 Wis. 2d 608, 619, 489 N.W.2d 689 (Ct. App. 1992). Lancaster claims prejudice because he believes he should have prevailed on the motion to dismiss based on a theory he did not raise. But Lancaster did not, and could not, claim prejudice because of a lack of notice: the criminal complaint originally alleged he tried to mutilate A.L.D.'s face, and the conduct on which the attempted mayhem charge was based was the same regardless of whether the focus was on her ear or face. *See* ***State v. Frey***, 178 Wis. 2d 729, 736, 505 N.W.2d 786 (Ct. App. 1993). Lancaster was not entitled to dismissal of the attempted mayhem charge.

[3] In its respondent's brief, the State argued that if Lancaster had objected because of the lack of proof about the ear, "the State would have moved at that time to amend the information … as opposed to the next day." We are unable to locate where the State moved to amend the information the following day, the State has provided no record citation for that motion, and there is no formally amended information in the file.

III. Confrontation Clause Violation

¶19 Because A.L.D. did not testify at trial, Lancaster also challenges the trial court's decision to admit statements A.L.D. made to Officer Laroque-Wishowski at her home after the scene had been cleared. Specifically, Lancaster says A.L.D. "made clear her accusations about what Lancaster had done" and had "accused Lancaster of beating her, pouring bleach on her, and trying to start her on fire on the stove."

¶20 "[A] defendant's right to confrontation is violated if the trial court receives into evidence out-of-court statements by someone who does not testify at trial if those statements are 'testimonial' and the defendant has not had a 'prior opportunity' to cross-examine the out-of-court declarant." ***State v. Rodriguez***, 2006 WI App 163, ¶12, 295 Wis. 2d 801, 722 N.W.2d 136 (citation omitted). Non-testimonial statements generally do not violate the confrontation clause. *See* ***Crawford v. Washington***, 541 U.S. 36, 68 (2004). Whether admission of an out-of-court statement violates the defendant's confrontation rights is a question of law we review *de novo*. *See* ***Rodriguez***, 295 Wis. 2d 801, ¶13.

¶21 "'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" ***Id.***, ¶18 (quoting ***Davis v. Washington***, 547 U.S. 813, 822 (2006)). Statements are "'testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'"

Rodriguez, 295 Wis. 2d 801, ¶18 (citation omitted). That is, the focus is on the "primary purpose" of the police questioning. *See* ***Michigan v. Bryant***, 562 U.S. 344, 359 (2011).

¶22 Lancaster and the State appear to agree that the relevant analysis in this case about whether A.L.D.'s statements to Laroque-Wishowski were testimonial or non-testimonial hinges on whether the police were in the process of meeting an ongoing emergency. Lancaster asserts that A.L.D.'s statements to Laroque-Wishowski were testimonial because the officer arrived after Carabelli had completed the protective sweep of the house for both Lancaster and any fire. Because of Carabelli's sweep, police knew A.L.D.'s case involved a "private domestic dispute" with no gun or other weapon that would threaten the public, that Lancaster was not on the scene and was therefore no longer a danger to A.L.D., and that medical help was on the way, so there was no more emergency. We reject Lancaster's argument.

¶23 "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." ***Id.*** at 363. Lancaster's absence may have, to some degree, lessened the emergency situation. *See* ***id.*** But A.L.D.'s medical condition at the time "is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." ***Id.*** at 364-65.

¶24 When Laroque-Wishowski arrived, medical help had not yet arrived. A.L.D. was burned on her hands and back and smelled of bleach. Laroque-Wishowski interviewed A.L.D. while A.L.D. was in the shower, and the officer could see skin peeling from her back. Carabelli testified that A.L.D. was confused

and struggled to provide details. Both officers indicated that A.L.D. appeared to be in pain. In short, when A.L.D. spoke to Laroque-Wishowski, she was still clearly suffering the "stress and cognitive disruption caused by the attack" such that circumstances objectively indicate that A.L.D.'s primary purpose was to obtain safety and help for her injuries, not provide statements for future prosecutions. *See* ***Rodriguez***, 295 Wis. 2d 801, ¶¶26-27. This is true regardless of where Lancaster was at the time. Thus, because A.L.D.'s statements were made to enable police to meet an ongoing emergency, those statements were non-testimonial, so there was no confrontation clause violation when Laroque-Wishowski testified about A.L.D.'s statements to her.[4]

By the Court.—Judgment affirmed.

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

[4] It appears that even if there were a confrontation clause violation from Laroque-Wishowski's testimony of A.L.D.'s statements, that violation was harmless. *See* ***State v. Martin***, 2012 WI 96, ¶¶43-46, 343 Wis. 2d 278, 816 N.W.2d 270. Also admitted at trial were the 911 recordings where A.L.D. identified Lancaster as her assailant and the statements A.L.D. made to emergency room personnel in which she reported that her significant other had been kicking and hitting her, held her face to a flame, and poured bleach over her head. Lancaster has not challenged the admission of that evidence on appeal.