COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1632-CR **Cir. Ct. No. 2008CF347**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD L. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Ronald L. Miller appeals a judgment convicting him of battery by a prisoner and disorderly conduct, both as a repeater. *See* WIS.

STAT. §§ 940.20(1), 947.01 and 939.62(1)(a) (2011-12).[1] He also appeals an order denying his motion for postconviction relief. Miller seeks either a new trial or resentencing. We reject his arguments and affirm.

¶2 While incarcerated at the Walworth county jail on an unrelated probation hold, Miller and another inmate, Pedro Gonzalez, were using back-to-back telephones in one of the pods. Gonzalez twice told Miller to "shut the fuck up" because Miller was yelling into the telephone he was using and Gonzalez could not hear his own conversation. Miller got up and punched Gonzalez. The jail nurse treated Gonzalez for a "tender" forehead, a "tender" nose and a swollen lip. Miller claimed he acted in self-defense after Gonzalez started the altercation. Two corrections officers witnessed the incident. One testified that she saw Miller hit Gonzalez about four times and that Gonzalez did not strike Miller. A jury found Miller guilty. The trial court denied his motion for postconviction relief. Miller appeals.

¶3 Miller first argues that the trial court erred when it ruled that a portion of the recording of the telephone call that he was on at the time of the disturbance was admissible.[2] Miller's end of the conversation contained what the court characterized as "loud, offensive words" and a correctional officer could be heard calling Miller's name twice and threatening to "spray" him.

[1] The judgment also recites his convictions at a separate trial of matters unrelated to this appeal. All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

[2] The trial court also allowed the jury to hear the portion of Gonzalez's telephone conversation from just before and during the disturbance. Miller does not challenge that ruling.

¶4 Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03. A trial court has broad discretion to admit or exclude evidence, and we will uphold its decision unless it has erroneously exercised that discretion. *See* ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727.

¶5 Miller argues that the only relevant part of the telephone conversation was what Gonzalez heard, and both men testified about that. The recording should not have been admitted, he contends, because his "harsh tone" and choice of language "put [him] in a bad light in a stark and prejudicial way."

¶6 The trial court limited the portion to be played to the conversation just before and during the altercation. It explained that it was not admitting the recording as other-acts evidence but to give context to Miller's and Gonzalez's state of mind and to "who was disorderly and who was not" and "whether there was self-defense or not." We agree. Such evidence is "part of the panorama of evidence" surrounding the offense that also is relevant to his defense. *See* ***State v. Johnson***, 184 Wis. 2d 324, 348-49, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, P.J., concurring). "[Evidence] of other acts for the purpose of providing the background or context of a case is not prohibited by [WIS. STAT.] § 904.04(2)." ***State v. Hereford***, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995).

¶7 Further, before playing the recording for the jury, the court told jurors the partial recording was being admitted on the issue of intent and for context or background. It specifically cautioned the jury that the evidence was not to be used to conclude that Miller "has a certain character or certain character trait and … acted in conformity with that trait or character," or "is a bad person." Cautionary instructions help to limit any unfair prejudice that otherwise might

result. ***State v. Hunt***, 2003 WI 81, ¶72, 263 Wis. 2d 1, 666 N.W.2d 771. We presume that a jury follows the instructions given to it. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶8 Next, Miller asserts that the prosecutor improperly "testified" during closing argument. He moved for a mistrial when the prosecutor stated that, having "looked at all of our evidence, heard all the same witnesses you heard, [and] looked at all the exhibits," the State had a duty to dismiss if it felt the case could not be proved beyond a reasonable doubt.

¶9 Miller's argument is without merit. The prosecutor did not "testify." She was allowed to tell the jury how she viewed the evidence and state that it convinced her and should convince the jurors as well. *See* ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). In addition, the court instructed the jury, "It's your decision about what the case shows." *See* ***Truax***, 151 Wis. 2d at 362. Nothing about the prosecutor's comments "so infect[ed] the trial with unfairness as to make the conviction a denial of due process." *See* ***Adams***, 221 Wis. 2d at 19.

¶10 Third, Miller argues that the trial court improperly instructed the jury as to self-defense. The court used WIS JI—CRIMINAL 815 and mistakenly included the last paragraph, which provides: "A person who provokes an attack whether by lawful or unlawful conduct with intent to use such an attack as an excuse to cause death or great bodily harm to another person is not entitled to use or threaten force in self-defense." Miller argues that the "death or great bodily harm" language confused or misled the jury and thereby prejudiced him. "A jury instruction is tainted and in error if 'a reasonable juror could misinterpret the

instructions to the detriment of a defendant's due process rights.'" ***State v. Dodson***, 219 Wis. 2d 65, 86, 580 N.W.2d 181 (1998) (citation omitted).

¶11 The inadvertently read language merely was extraneous to the proper instruction. A correct statement of the law in another part of the charge can render an incorrect statement harmless when the charge as a whole does not misdirect the jury. ***State v. Hoover***, 2003 WI App 117, ¶29, 265 Wis. 2d 607, 666 N.W.2d 74. Also, this case stemmed from a flare of tempers in view of jail guards, and resulted in little more than a fat lip. We agree with the State that no reasonable jury would have believed that a threat of death or great bodily harm came into play at all. A jury instruction error is harmless when the verdict would not be different under a correct instruction. *See* ***id.***

¶12 The last issue concerns Miller's sentence credit. Miller already was in custody in the Walworth county jail on August 25, 2008, the date of the altercation with Gonzalez. Bail was not set on the Gonzalez matter until April 1, 2009. Miller contends that he was wrongly denied sentence credit for the seven-plus months he was in custody before bail was set. We disagree.

¶13 A convicted offender is to be given sentence credit for all days spent (1) in custody and (2) "in connection with the course of conduct for which sentence was imposed." ***State v. Hintz***, 2007 WI App 113, ¶6, 300 Wis. 2d 583, 731 N.W.2d 646; *see also* WIS. STAT. § 973.155(1)(a). The "custody" includes that which "is in whole or in part the result of a probation, extended supervision or parole hold … placed upon the person for the *same course of conduct* as that resulting in the new conviction." Sec. 973.155(1)(b) (emphasis added). The statute is devoid of any suggestion of "the possibility of dual credits where

consecutive sentences are imposed." *See* ***State v. Boettcher***, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988).

¶14 Miller clearly was "in custody" but it was on an *unrelated* probation hold and thus not "in connection with the course of conduct for which [this] sentence was imposed." In addition, Miller misses, or misunderstands the significance, that the sentences in ***Hintz*** were concurrent. Wisconsin prohibits double credit where, as here, sentences are imposed consecutively. ***State v. Brown***, 2010 WI App 43, ¶5, 324 Wis. 2d 236, 781 N.W.2d 244.

By the Court.—Judgment and order affirmed.

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