COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1739-CR **Cir. Ct. No. 2010CF1004**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DESMOND DEJUAN LASTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

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

¶1 FINE, J. Desmond Dejuan Laster appeals the judgment entered after a jury found him guilty of: (1) four counts of first-degree intentional homicide, while armed, and as party to a crime, *see* WIS. STAT. §§ 940.01(1)(a), 939.63 & 939.05; (2) arson as party to a crime, *see* WIS. STAT. §§ 943.02(1)(a) &

939.05; and (3) unlawfully possessing a firearm as a previously convicted felon, *see* WIS. STAT. § 941.29(2). Laster claims the trial court erroneously exercised its discretion when it: (1) allowed the State to challenge his alibi witness, Sabrina Hunt, with what he claimed was irrelevant evidence, by asking if she had committed child abuse at her daycare center; (2) allowed the State to play a jail-recorded phone conversation where Laster called his mom a "mother fucker" and other derogatory names; and (3) denied his request for a mistrial when the prosecutor asked Laster about coaxing Hunt to testify. We affirm.

I.

¶2 In the early morning on February 26, 2010, Laster, Anthony Barnes, and Brittney Robertson went to the duplex where Rachel Thompson lived in the upper unit with her four- and three-year-old sons and her newborn baby. Robertson also lived there, but had been told to move out. The group robbed, beat, shot at, and stabbed Thompson to death. They also duct-taped the boys' hands and feet and duct-taped plastic bags over the boys' heads. They set the home on fire, took the baby, and left. Thompson and her two older sons died.

¶3 The downstairs residents awoke to smoke and fire at 4:40 a.m. and called for help. The desk clerk at a nearby hotel said Laster, Barnes, Robertson and a baby checked into the hotel at 5:15 a.m. The desk clerk saw Robertson leave the hotel with Laster and the baby at 12:15 p.m. Videotape from the hotel security cameras confirmed the clerk's identifications. The baby was found abandoned at a nearby church at 12:55 p.m. Sometime that afternoon, Robertson's cousin, Brad Hoeppner, called her cell phone. Hoeppner said Robertson confessed to killing Thompson and her kids with a "couple other people" for "some guy that she was seeing." She also told Hoeppner that she had left the baby at the church.

Later the same day, Robertson was found shot in the head. Two witnesses saw two black men fleeing the scene of the shooting and getting into a white Pontiac. A bullet and cartridge casing found where Robertson was shot matched the bullet and cartridge casing found at the duplex.

¶4 The police arrested Barnes and he confessed. The police arrested Laster, but he denied taking part in the crimes. Laster's fingerprints, however, matched those found both on the duct tape and a plastic bag used to suffocate the boys. He was also identified by the hotel clerk, the hotel videotape cameras show Laster at the hotel, and he drove a white Pontiac. Moreover, two prisoners, who shared jail pods with Laster said he admitted to killing Thompson, her boys, Robertson and to setting the duplex on fire.

¶5 Barnes pled guilty and testified at Laster's jury trial. He told the jury:

- Laster called him "at about 3:30 a.m." and "asked [him] to come with him to move his friend out of a house that she was gettin' kicked out of."

- Laster picked him up in a "white Pontiac" and told him the plan to "move his girl out" and "take whatever money was in the house."

- When they got to the duplex, Robertson met them and let them in. Laster told Barnes to take the "[t]wo cans of lighter fluid" from "the backseat of the car" into the duplex.

- Laster "punche[d] [Thompson] awake" and demanded money.

- After robbing Thompson, they duct-taped her and the two boys, and then duct-taped plastic bags over the boys' heads. Brittany got knives from the kitchen and repeatedly stabbed Thompson. Laster got a knife and slit Thompson's throat. They spread the lighter fluid around and set the place on fire. Laster gave Barnes a gun he had found in the duplex and told him to shoot Thompson. Barnes fired the gun "in the vicinity" of Thompson.

- They took the newborn baby and supplies with them and, after changing clothes, went to the Diamond Inn. Laster and Robertson tried to check-in, but they did not have any identification so Barnes had to come to the front desk and show his ID.

- Barnes said he left the hotel at 8:00 a.m., walked to his brother's house, and told him what happened. At about 3:30 p.m., Laster picked him up, and the two went to pick up Robertson, with the intent to kill her because they thought she was going to get them caught. When they got out of the car and walked behind a home, Barnes shot Robertson.

- After, they hid the gun "in somebody[']s] basement."

¶6 Laster, whose defense was that he was not at either crime scene, called Hunt to testify as an alibi witness. Hunt testified that:

- She knew Laster because she was "best friend[s]" with the mother of his kids, Chante Yarbrough. She denied being a good friend of Laster.

- On February 26, 2010, at about "6:45, 6:50" Yarbrough asked Hunt "to ride with her go pick up Desmond." They picked him up and came back to Hunt's grandmother's house where they stayed "until about 10:30, 10:45."

- On cross-examination, Hunt testified that she was "not sure of the date." It "could have been the 27th" "or it could have been the 25th."

- Hunt had a daycare center where Yarbrough's four- and two-year-old sons went.

¶7 During cross-examination, the prosecutor asked questions about a recorded conversation Hunt had with Laster:

> Q … You said: Shit this little boy, I had hit him shit. That means you hit somebody at daycare, right?
>
> A I didn't hit nobody at daycare.
>
> Q Then the next thing you say is: I had jack the nigga up in the corner. Do you remember saying that?
>
> A Correct.
>
> ….
>
> Q What does that mean when you jacked the little kid up in the corner?
>
> A I just had him in the corner.
>
> Q Okay. And then you said: And I had Pooter [Laster's son] givin' it to him. How is Pooter givin' it to the little boy in the corner?
>
> A I had Pooter hit him back.
>
> Q You had a child hit another child back in daycare?
>
> A Correct.

> Q And that's the defendant's son you had hit somebody; is that right?
>
> A Correct.
>
> Q And then it says: I be jumpin' them, I been them jumpin' on, I been have them jump there on kids. So you had Pooter's (sic) son jump on other kids at school?
>
> A No, I have not. Any kids that hit other kids, I tell him to hit them back.
>
> Q Okay. Well, what does this mean: I be havin' them jumpin' on. I be havin' him in there jumpin' kids?
>
> A If they hit him -- Because he the type of kid that does not hit other kids back. If they are gonna pick on him at daycare and I tell him if they are hittin' him to hit 'em back.
>
> Q And it says: I hit him.
>
> A I did not hit no child.
>
> Q But you said that, right?
>
> A No, I don't recall saying I hit a child.
>
> Q Well, you heard the tape.
>
> A I did not hit a child.
>
> THE CIRCUIT COURT: Let's move along.

¶8 Laster also testified. During his cross-examination, the prosecutor asked him questions about whether he told his witnesses to "clean up the stuff that you sent" to them, including:

> Q And you got really mad at your mom. In fact, you are calling your mom a mother fucker and all kinds of stuff, is that right, on the tape?
>
> [Defense lawyer]: Objection, relevance.
>
> A Yes.

[Prosecutor]: No, it is relevant.

THE COURT: Overruled.

Q Right?

A Yes, yes.

Q Because she threw things away, right?

A Yes.

[Prosecutor]: That's all I have.

¶9 The prosecutor also asked Laster about pressuring Hunt to testify and telling her not to worry because his lawyer would "lead her":

Q And then you told Sabrina Hunt don't worry about what she's gonna testify to because [Laster's trial lawyer] will lead her through it, right?

A He had questions for her that she wouldn't have to worry about answering because … she knew the answers.

Q -- because he'll lead her through it, right? That's what you said.

A Yeah but I didn't tell her what to say.

[Defense lawyer]: Objection to this line of questions.

THE COURT: Sustained. Let's move along.

Q And then you told Sabrina I will tell you what I want you to testify to when you get down here, right?

A Never. Never said that.

Q You didn't say that?

A I never said that. No.

¶10 When the prosecutor started to play a recorded phone conversation between Laster and Hunt, Laster's lawyer objected and demanded to stop the tape. Laster's trial lawyer asked for a mistrial:

> This is an issue that came up and it was understood and I thought there was an agreement that portions of these recordings that referenced me and my involvement in the case and my representation of my client were not going to be played for the jury. And we've heard the recordings that reference me, and [the prosecutor] went into a line of questioning about how I was going to take care of a witness and get her through her testimony.
>
> So I believe the impression has been made to this jury that I am involved in or I'm a part of fabricating, or potentially fabricating my client's case.
>
> And I had thought we had made it very clear that that was not going to be implied and we weren't going to have evidence that was going to imply it. So now I think the jury has an impression that's on me that's going to harm my client's case and I think it's tainted the jury and I am moving for a mistrial.

¶11 The trial court ruled that any error could be cured with an instruction. Both sides drafted and agreed to giving the jury the following instruction: "In the trial testimony you may have heard references to the respective parties' lawyers; this testimony is to be considered only as to the state of mind of the witness, it should not be considered against the lawyers. Both lawyers have properly exercised their duties."

¶12 As noted, the jury found Laster guilty on all counts.

II.

A. *Day-care abuse questions asked of Hunt.*

¶13 Laster argues that the questions the prosecutor asked Hunt about child abuse at her day-care center were irrelevant and unfairly prejudiced the credibility of his alibi witness. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. RULE 904.01. Admission of evidence is left to the discretion of the trial court. ***State v. Sullivan***, 216 Wis. 2d 768, 780–781, 576 N.W.2d 30, 36 (1998). Evidence is inadmissible 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." WIS. STAT. RULE 904.03. We affirm evidentiary rulings if the trial court examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion. ***State v. Veach***, 2002 WI 110, ¶55, 255 Wis. 2d 390, 414, 648 N.W.2d 447, 459.

¶14 Here, the trial court found the day care questions relevant to show whether Hunt was biased due to a close relationship with Laster. Inquiring into a witness's bias is always material and relevant. *See* ***State v. Williamson***, 84 Wis. 2d 370, 383, 267 N.W.2d 337, 343 (1978). The inquiry here established circumstantial evidence of a relationship between Hunt and Laster that was relevant to whether Hunt would fabricate an alibi to help Laster. Laster has not shown that the trial court erroneously exercised its discretion.

B. *Laster's name-calling.*

¶15 Laster also claims admission of evidence that he called his mother a "motherfucker" and other derogatory names improperly "aroused[d] the jury's sense of horror." He argues that the names and what his mother threw away do not show consciousness of guilt, and therefore are not relevant. Again, evidentiary decisions are discretionary. *See* ***Sullivan***, 216 Wis. 2d at 780–781, 576 N.W.2d at 36. An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 668, 734 N.W.2d 115, 127–128 (quoted sources and quotation marks omitted).

¶16 The trial court did not explain why it overruled Laster's relevance objection to this evidence. Assuming, but not deciding, that the trial court should have sustained the objection, we conclude that any error was harmless beyond a reasonable doubt. The evidence against Laster was strong: (1) his accomplice testified against him; (2) his fingerprints were found on the murder weapon; (3) his alibi witnesses could not testify with any certainty; (4) eyewitnesses (and a video camera) saw him at the hotel with Robertson and Barnes shortly after the crimes. Further, if anything "aroused[d] the jury's sense of horror" it was the crimes that the jury found Laster committed, along with Barnes and the murdered Robertson. The contention that having the jury hear that Barnes called his mother a name that is commonly heard in the media somehow made the jury convict an innocent person borders on the frivolous.

C. *Mistrial.*

¶17 Laster claims that the trial court should have granted his motion for a mistrial. He argues that the trial court improperly allowed the prosecutor: (1) to

ask Hunt about Laster's lawyer "leading" Hunt through her testimony, and (2) to play parts of the recorded jail phone conversations that discussed the lawyer's representation.

¶18 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.

¶19 The Record here supports the trial court's decision to deny the request for a mistrial. The trial court determined any error could be corrected with a curative instruction. Both parties agreed and worked together to come up with the language of the instruction. The instruction was read to the jury. We presume the jury followed the curative instruction. *See* ***State v. Searcy***, 2006 WI App 8, ¶59, 288 Wis. 2d 804, 841, 709 N.W.2d 497, 514. Laster has not shown us any reason to overturn the trial court's exercise of discretion.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.