COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2515-CR **Cir. Ct. No. 2011CF2293**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ONDREA RAY MATTHEWS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Ondrea Matthews appeals from a judgment of conviction for one count of second-degree sexual assault of a child, contrary to

WIS. STAT. § 948.02(2) (2001-02).[1] Matthews argues that the trial court erroneously exercised its discretion by refusing to declare a mistrial when the jury was improperly presented with evidence that Matthews may have served time in jail. We affirm.

BACKGROUND

¶2 Matthews was charged with one count of repeated sexual assault of a child based on allegations made by his daughter, Andrea W. According to the criminal complaint, nine-year-old Andrea W. told police officers that when she was seven or eight years old, she had overnight visits with Matthews in Milwaukee and he "would rub his penis on her bare vagina and anus" while they were in a bed they shared.

¶3 Matthews was serving a prison term in Iowa when he was interviewed by two Milwaukee detectives about Andrea W.'s allegations.[2] During the interview, which was audio-recorded, Matthews acknowledged having sexual contact with Andrea W. when she visited him at his sister's house in Milwaukee. Matthews indicated that the contact happened about three times, and he acknowledged that on one occasion, he placed a pillow over Andrea W.'s face while he rubbed his penis against her vagina.

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

[2] According to the presentence investigation report, Matthews served time in Iowa for five crimes, including: sexual abuse in the third degree, lascivious acts with a child, failing to register as a sex offender, possession of marijuana, and tampering with a witness or juror.

¶4 The case proceeded to trial, where Matthews's defense was that the assaults never happened and that he lied to the detectives who interviewed him because he "just wanted to get out of there." He claimed that he was "shocked" by his daughter's allegations.

¶5 There were ultimately two jury trials: the first ended in a hung jury and the second resulted in Matthews's conviction for one count of the lesser-included offense of second-degree sexual assault of a child.

¶6 Prior to the second trial, Matthews filed a motion *in limine* to exclude some of the audio recording of his confession because, according to the motion, certain statements on the recording "make it obvious that [Matthews] was in prison at the time of the interrogation, receiving psychological treatment for sexual misconduct." The trial court agreed. It acknowledged that the State had already taken steps to remove references to incarceration, but it concluded that it was important that the jurors not "convict [Matthews] of this charge because they believe he … committed some other … crime."

¶7 Consistent with the ruling on the motion *in limine*, witnesses were instructed not to refer to Matthews being incarcerated. Unfortunately, two witnesses nonetheless made brief references to "jail."

¶8 First, when Andrea W. was asked on direct examination whether she "had much contact with" Matthews after she turned eight years old, she answered: "Yes. He wrote letters and sometimes called. I don't know if it was from jail. I don't know where he was." The defense did not object or move to strike the answer and the State proceeded to ask several other questions. When the State completed its examination, the trial court on its own initiative asked the attorneys

for a sidebar conference. After the sidebar, the defense proceeded with its cross-examination of Andrea W.

¶9 After Andrea W. finished testifying, the trial court gave the jury a break and summarized the sidebar concerning Andrea W.'s "slip" where she mentioned jail. The trial court accepted the State's assurance that it had previously told Andrea W. not to mention jail. Trial counsel did not dispute what Andrea W. was told, and he also agreed that the State's question did not invite a reference to jail. Trial counsel noted, however, that Andrea W. had made the same mistake at the first trial, which led the trial court at the first trial to give a cautionary jury instruction to remedy the error.[3] Trial counsel said that he was "not asking for that [instruction] at this point" in the second trial. The trial court asked trial counsel why the instruction should not be immediately given to the jury in light of Andrea W.'s reference to jail. Trial counsel responded:

> [I]t's a strategic decision. I don't want to draw any more attention to that statement than has already been there.
>
> Secondly, I still anticipate that Mr. Matthews will be testifying … [and] will include mention of nine convictions. So putting those two things together … will not be necessarily surprising to a jury…. I think we are still avoiding all the implications that we had with the problems that I brought in a motion *in limine* regarding the statements in the [confession] transcript. None of what she

[3] The instruction that was given in the first trial was:

> Evidence has been received which might suggest to you that Mr. Matthews was incarcerated in jail or in prison at one time in his life. Whether or when Mr. Matthews was incarcerated or why is not proof of the offenses being submitted to you and therefore you should not consider whether Mr. Matthews was incarcerated in jail or in prison at one time in his life.

> said makes it sound as though Mr. Matthews was in custody in prison for sexual misconduct or treatment or anything like that. So I don't think we are anywhere near that territory right now.

The trial court accepted trial counsel's strategic decision and the trial proceeded without any special instruction to the jury about Andrea W.'s reference to jail.

¶10 The second time that a State's witness referenced jail was when a detective was asked to read into evidence portions of a letter that Andrea W. wrote to Matthews about the assaults. As soon as the detective read the word "jail," the State redirected him. The jury heard the following:

> [Detective, reading the letter]: I am through with talking to you. So stop saying, Andrea, do you love me because I don't. Bye, Andrea. When you get out of jail, go to –
>
> [State]: Actually let's just go right to the P.S. portion.

After the detective read a few more sentences, there was an off-the-record discussion and then the State and trial counsel continued questioning the detective.

¶11 On a break, the trial court addressed the issue concerning the detective's reference to "jail." It was undisputed that the State had not intended the detective to read that portion of the letter. Trial counsel moved for a mistrial, based on Andrea W.'s and the detective's references to jail. Trial counsel explained: "[T]hose two slips now have made it quite clear that Mr. Matthews was in custody at the time of the interrogation at least. I think that inference is improper and I think … that Mr. Matthews suffers undue prejudice from those mistakes." The State opposed the motion, arguing that the error would be solved with a curative instruction.

¶12 The trial court denied the motion for a mistrial. It found that the State and the detective had not intentionally violated the pretrial order. The trial

court explained: "I think [the detective] was just reading from one end [of the letter] to the other without stopping to look ahead to see whether the information that he was about to read was prejudicial."

¶13 The trial court also said that "the fact that someone is in jail previously is not that prejudicial." It said that while courts frequently "go to the lengths we have [here] to try to scrub the evidence going before the jury" so that they can avoid "the delicate matter of instructing the jury" about references to imprisonment, a jury instruction was now needed in this case. The trial court read the same jury instruction concerning references to jail that it gave at the first trial.[4] It read that instruction as soon as the jurors returned after their break and again as part of the final jury instructions.

¶14 The jury found Matthews guilty of the lesser-included offense of second-degree sexual assault of a child.[5] He was sentenced to sixteen years of initial confinement and six years of extended supervision. This appeal follows.

DISCUSSION

¶15 Matthews argues that the trial court erroneously exercised its discretion when it denied his motion for a mistrial. At the outset, we note that

[4] Matthews did not object to the wording of the curative instruction. In fact, trial counsel told the trial court that if a mistrial was not granted, then he wanted the trial court to give a curative instruction that was similar to the one given at the first trial.

[5] In its brief, the State asserts that the reason the jury did not convict Matthews of repeated sexual assault of a child—which requires the State to prove at least three assaults—was that Andrea W. gave detailed testimony about two instances of assault that occurred at her aunt's house but "could not specify when and where Matthews assaulted her on the requisite third occasion." In his recorded confession, Matthews said he assaulted Andrea W. at his sister's house, but he denied assaulting her anywhere else.

Matthews does not assert that the witnesses' references to jail were intentional. He explains: "To be sure, these jailhouse references were in all likelihood inadvertent and may have been made despite diligent attempts to exclude these references." He argues that even if the mistakes were inadvertent, the trial court should have granted a mistrial because "the bell of prejudice could not … be unrung."

¶16 "Whether to grant a mistrial is a decision that lies within the sound discretion of the [trial] court." ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. A trial court considering a motion for mistrial "'must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial.'" ***Id.*** (citation omitted). In doing so, the trial court must "consider[] alternatives such as a curative jury instruction." ***State v. Moeck***, 2005 WI 57, ¶72, 280 Wis. 2d 277, 695 N.W.2d 783. On appeal, this court will reverse the denial of a motion for mistrial "'only on a clear showing of an erroneous use of discretion' by the [trial] court." ***Doss***, 312 Wis. 2d 570, ¶69 (citation omitted).

¶17 Applying those standards here, we conclude that the trial court did not erroneously exercise its discretion when it opted to give a curative instruction to the jury. The two brief references to "jail" did not tell the jury when or why Matthews may have been in jail, and they certainly did not allude to the fact that Matthews had been convicted of assaulting another child or was receiving sex offender treatment. Moreover, because Matthews took the stand, as trial counsel's opening statement indicated he would, the jury learned that Matthews had been convicted of a crime nine times. Therefore, as trial counsel himself noted, it would "not necessarily be surprising to a jury" that Matthews may have served time in jail. *See* ***State v. Cooks***, 2006 WI App 262, ¶¶46-48, 297 Wis. 2d

633, 726 N.W.2d 322 (defendant was not prejudiced by his trial counsel's failure to object to trial court's ruling that State could present brief testimony that a witness met the defendant in prison, in part because the defendant "testified to having eight prior convictions," which "would have reasonably suggested to the jury that [the defendant] probably had been incarcerated in the past").

¶18 Most importantly, the trial court gave a curative instruction to the jury—both after the second reference to jail and at the end of the trial—that directed the jury not to consider "whether Mr. Matthews was incarcerated in jail or in prison at one time in his life." We presume that the jury followed the trial court's instruction. *See* ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780 ("Jurors are presumed to have followed jury instructions."). Further, "[w]here the trial court gives the jury a curative instruction, this court may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the trial court's admonition." ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894. The record does not suggest that the jury disregarded the trial court's instruction.

¶19 Matthews argues that a mistrial should have been granted because "[e]vidence of prior crimes is always prejudicial to a defendant." Matthews's argument is not compelling. Matthews elected to testify, so the State was entitled to ask Matthews whether he had ever been convicted of a crime in order to impeach his credibility. *See* WIS. STAT. § 906.09. Thus, even if Andrea W. and the detective had not mistakenly referenced jail, the jury would have still learned that Matthews was previously convicted of nine crimes.

¶20 Matthews also compares the references to jail to the harm a defendant suffers "when a jury views him wearing jailhouse garb." He argues:

"In this case, [Matthews] was labeled a bad man in the eyes of the jury by the admission of references to his incarceration. He was seen as a jailhouse defendant and although not technically in jailhouse garb he might as well have been." We are not convinced. The jury heard two brief references to jail: one a statement from Matthews's daughter that he might have been in jail and the other a quote from his daughter's letter suggesting that Matthews was in jail. The State made no reference to Matthews's past incarceration in closing argument, arguing instead that both Andrea W.'s testimony and Matthews's confession demonstrated his guilt. The trial court did not erroneously exercise its discretion when it concluded, after considering the trial as a whole, that the two brief references to jail were not "'sufficiently prejudicial to warrant a new trial.'" *See* ***Doss***, 312 Wis. 2d 570, ¶69 (citation omitted).

¶21 For the foregoing reasons, we conclude that the trial court did not erroneously exercise its discretion when it determined that a curative instruction was adequate to cure the error caused by the two mistaken references to jail. Matthews is not entitled to a new trial.

By the Court.—Judgment affirmed.

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