COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP823-CR **Cir. Ct. No. 2014CF16**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS D. HALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 PER CURIAM. Nicholas D. Hall appeals from a judgment of conviction for one count of intentionally violating a no-contact order issued

pursuant to a felony conviction and for one count of disorderly conduct, contrary to WIS. STAT. §§ 941.39 and 947.01(1) (2013-14).[1] Both crimes included the habitual criminality penalty enhancer and were designated domestic abuse incidents. *See* WIS. STAT. §§ 939.62(1)(b) and 968.075(1)(a). Hall also appeals from an order denying his postconviction motion for a new trial. He argues: (1) the trial court erroneously denied his motion to suppress a 911 call; (2) trial counsel provided ineffective assistance; and (3) the trial court erroneously denied Hall's motion for a mistrial. We reject his arguments and affirm.

BACKGROUND

¶2 On December 30, 2013, two calls to 911 were placed from the home of K.J. The first call, which lasted just under seven minutes, was from a woman who identified herself as K.J.'s mother, N.R. N.R. asked that police officers be sent to the home because K.J. and K.J.'s boyfriend were fighting. N.R. identified K.J.'s boyfriend as Hall and, in response to questions from the operator, N.R. described Hall's physical appearance. That recorded call includes the sound of male and female voices yelling in the background.

¶3 The second 911 call was placed several minutes later by K.J. She told the operator that Hall had left and that she did not need an ambulance. K.J. also told the operator that Hall was on probation and suggested a location where the police may be able to find him.

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

¶4 In response to the 911 calls, two police officers arrived at the residence. One officer observed that K.J. "had a busted lip" and scratches on her arm and neck. He also saw that there was damage to the entrance door of the home, a bedroom door, a wall, and a television. K.J. told the officers that they might be able to find Hall at a specific home. When officers went to that home, they were not initially let inside the residence. They subsequently determined that someone had jumped out a window. They followed that individual's footprints in the snow, found Hall hiding in a bush, and arrested him.

¶5 Hall was charged with four crimes, including: (1) violating the no-contact order entered in a prior felony case in which K.J. was also the victim; (2) criminal damage to property; (3) battery; and (4) obstructing an officer. The State subsequently filed an amended information that changed two of the charges: criminal damage to property was amended to criminal trespass to a dwelling, and battery was amended to disorderly conduct.

¶6 The State filed a pretrial motion to admit the two 911 calls at trial on grounds that the statements made during those calls qualified as hearsay exceptions. Hall filed a motion to exclude the 911 calls, asserting that the statements did not qualify as hearsay exceptions and that admitting them would violate Hall's constitutional right to confrontation. The trial court admitted the first 911 call after concluding that the statements N.R. made qualified as exceptions to the hearsay rule and were non-testimonial, but it excluded the second 911 call after concluding that N.R.'s statements made during that call were testimonial.

¶7 The case was scheduled for a jury trial several times. K.J. appeared for trial on one occasion, but the case was rescheduled due to court congestion.

When the case was ultimately tried, neither K.J. nor N.R. appeared to testify. As a result, the State presented its case through the testimony of the two officers who responded to the calls and through the 911 operator who handled the first call. The entire recording of the first 911 call was played for the jury.

¶8 Hall chose not to testify and the defense did not call any witnesses. The jury found Hall guilty of intentionally violating the no-contact order and disorderly conduct, but it acquitted him of criminal trespass and obstructing an officer. The trial court entered judgments of conviction and acquittal consistent with the jury verdicts. It sentenced Hall to three years of initial confinement and three years of extended supervision for the felony, concurrent with a revocation sentence Hall was serving. It imposed a nine-month sentence for the misdemeanor, consecutive to the felony and Hall's revocation sentence.

¶9 New counsel was appointed for Hall. Hall filed a postconviction motion seeking a new trial on grounds that he was denied the effective assistance of trial counsel. The trial court denied the motion in a written order, for reasons outlined below. This appeal follows.

DISCUSSION

¶10 Hall seeks a new trial on several bases, including issues raised before, during, and after trial. We consider each in turn.

I. Admission of the first 911 call.

¶11 The trial court determined that the statements N.R. made during the first 911 call fell under the excited utterance and present sense impression exceptions to the hearsay rule. *See* WIS. STAT. RULE 908.03(1) & (2). On appeal, Hall does not challenge that determination. Instead, Hall argues that admission of

the statements violated his right to confrontation because N.R.'s statements were testimonial, as opposed to non-testimonial.[2] *See* ***Crawford v. Washington***, 541 U.S. 36, 68 (2004) (holding that a defendant's confrontation rights are violated if the trial court received evidence of out-of-court statements by someone who does not testify at trial if those statements are "testimonial" and the defendant had no prior opportunity to cross-examine the witness).

¶12 The United States Supreme Court in ***Davis v. Washington***, 547 U.S. 813 (2006), discussed the difference between testimonial and non-testimonial statements:

> Statements are non[-]testimonial 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. They 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.

Id. at 822. The facts in ***Davis*** were similar to those presented here: at issue was the admissibility of statements a woman made to a 911 operator during a domestic disturbance, including statements offered in response to the operator's questions about who the perpetrator was and what he was doing. *See* ***id.*** at 817-18. ***Davis*** held that at a minimum, the earliest statements made in response to the operator's

[2] In addition, Hall states in a footnote: "It is also worth noting that, for the purposes of demonstrating that N.R. was unavailable, the record does not reflect that the State made reasonable, good-faith efforts to procure N.R.'s attendance." Hall does not claim to have raised this issue in his written motion or his oral argument to the trial court, and we have not identified any time when it was raised. We decline to address arguments raised for the first time on appeal. *See* ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396.

questions were non-testimonial, because the "primary purpose was to enable police assistance to meet an ongoing emergency." *See* ***id.*** at 828-29.

¶13 Applying those standards here, we must determine whether the statements N.R. made to the 911 operator—including statements offered in response to the operator's questions—were testimonial or non-testimonial. We review Hall's confrontation clause challenge *de novo*. *See* ***State v. Beauchamp***, 2011 WI 27, ¶13, 333 Wis. 2d 1, 796 N.W.2d 780 ("'Whether admission of a hearsay statement violates a defendant's right to confrontation presents a question of law that this court reviews *de novo*.'") (citation omitted; italics added).

¶14 Hall argues, as he did in his pretrial motion, that N.R.'s statements were testimonial because "the emergency was not ongoing" and "the statements were taken solely for the purpose of preservation for future prosecution." He notes that during the call, N.R. twice told the operator that Hall was leaving. Hall asserts: "[T]his is evidence that there was no ongoing emergency, and that any questions, regarding identification or otherwise, were for the purpose of eliciting testimonial statements."

¶15 The trial court rejected this argument, concluding that the statements were non-testimonial. It discussed the substance of the 911 call:

> We have the mother describing the fighting going on between her daughter and the defendant and you can hear it…. The mother at one point starts yelling as well. You can hear a woman's voice in the background. You can hear a man's voice. Toward the end it gets pretty intense. You can hear screaming and it sounds like total chaos and the person who is taking the call is asking what's going on. The defendant is still there throughout the call until the point … when he's then described as still being in front of the house yelling.
>
> ….

> … [T]here is an ongoing emergency as can be heard by the fact of everybody yelling and the commotion going on in the background. It's clearly still taking place and even at the end when she describes the defendant as leaving, she says that he's still in the front of the house yelling. I think it is still an ongoing emergency even … at that point, and the purpose of the call is … to get the police to come right now because this is happening right now.

¶16 This court has listened to the 911 call and has reviewed the call transcript the jury used as an aid when listening to the call at trial.[3] We agree with the trial court's assessment. Throughout the call, yelling can be heard in the background, and the operator had to call out to N.R. to regain her attention after N.R. was distracted by the events taking place in the home. Although N.R. told the operator just before the call ended that Hall had left the home, she also noted that he was outside the home yelling; that yelling is audible on the recording. We agree with the trial court that N.R.'s statements, including her answers to the operator's questions, were non-testimonial because they were made "to enable police assistance to meet an ongoing emergency." *See* ***Davis***, 547 U.S. at 828-29. Therefore, we reject Hall's challenge to the admissibility of the 911 call.

II. Ineffective assistance.

¶17 In his postconviction motion, Hall argued that he was entitled to a new trial based on ineffective assistance of trial counsel. To prove ineffective assistance, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Id.*** at 697. An

[3] These exhibits were not part of the original appellate record, but this court granted Hall's January 2016 motion to supplement the appellate record with those exhibits.

evidentiary hearing preserving the testimony of trial counsel is "a prerequisite to a claim of ineffective representation on appeal." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A motion for a ***Machner*** hearing may, at the discretion of the trial court, be denied "'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citation and emphasis omitted).

¶18 Hall argued that his trial counsel provided ineffective assistance in two ways. First, Hall argued that his trial counsel acted deficiently when he failed to object to an officer's hearsay testimony that K.J. identified herself to the officer.[4] Hall argued that this deficiency prejudiced Hall because it was "the only direct evidence that [K.J.] was present" at the scene, which the State was required to demonstrate in order to prove that Hall violated WIS. STAT. § 941.39.

¶19 The trial court held that Hall's motion did not demonstrate prejudice because even if K.J.'s self-identification had not been admitted through the first officer who testified, the jury still heard N.R. identify K.J. on the 911 call.[5] On appeal, Hall's opening brief does not directly address the trial court's reasoning, except to acknowledge in a footnote that the 911 call "contained statements regarding the identification of individuals present at the scene." In his reply brief,

[4] Trial counsel objected when the second officer was asked whether K.J. had identified herself. The trial court sustained that hearsay objection.

[5] On appeal, the State argues that another reason Hall was not prejudiced was that the State could have called Hall's probation agent to identify K.J. from the photographs that the officers took to document her injuries. Because the trial court's reasoning is sufficient to sustain the order, we do not address this additional reason offered by the State.

Hall again acknowledges that fact, but adds: "[T]he admissibility of the 911 call is also a part of this appeal."

¶20 We agree with the trial court that Hall's motion did not demonstrate prejudice and, therefore, he was not entitled to an evidentiary hearing or relief. We have concluded that the first 911 call was properly admitted, and K.J. is identified on that call as the woman arguing with Hall. Hall does not explain how he can demonstrate prejudice given that the 911 tape was properly admitted. Therefore, his argument fails.

¶21 Hall's second allegation is that his trial counsel was ineffective because he failed to object to both officers' hearsay testimony of the address where K.J. said they could find Hall. In his postconviction motion, Hall argued that he was prejudiced by the admission of this evidence "not because it is direct evidence of guilt, but because it provided the officer with foundation to present further evidence of guilt." He explained:

> Circumstantial … evidence [of] guilt was presented indicating that the defendant had fled the scene and was later found hiding in a bush. This evidence was highly prejudicial, and would not have been introduced but for the necessary foundation; namely, the factual assertion as to where the defendant could be located.

¶22 The trial court rejected this argument on grounds that it would have overruled any objection to the officers' testimony that K.J. told them where they could find Hall. The trial court even cited one instance where it did, in fact, overrule trial counsel's objection to this testimony, although the stated basis for trial counsel's objection was "foundation" rather than hearsay.

¶23 Even if we accept Hall's assertion that his trial counsel should have objected differently or more often to the testimony that K.J. told the officers where

to find him, Hall's postconviction motion did not demonstrate prejudice. Specifically, his motion did not adequately explain why the officers would have been barred from testifying about their attempt to find Hall at a particular residence, even if they were not permitted to say how they knew to look for him at that residence. As the State noted in its appellate brief: "Had the testimony simply placed the police at Hall's location without an explanation of why they went there, this would not have precluded the evidence that Hall had led officers on a brief foot chase before he was apprehended." Thus, the testimony that Hall claims was prejudicial—that he fled the residence after the police arrived and was found hiding in a bush—would still have been admitted.

¶24 Because "'the record conclusively demonstrates'" that Hall was not entitled to relief because he failed to demonstrate prejudice based on either of the two alleged errors, it was within the trial court's discretion to deny Halls' motion without a hearing. *See* ***Roberson***, 292 Wis. 2d 280, ¶43 (citation and emphasis omitted). We are not persuaded that the trial court erroneously exercised its discretion.

III. Denial of motion for mistrial.

¶25 Hall argues that "[a] mistrial should have been declared" based on two instances where a witness made a statement and, after the defense objected, the objection was sustained and the testimony was stricken. (Bolding omitted.) Whether to grant or deny a mistrial is within the trial court's discretion. ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. A mistrial is appropriate if the trial court determines, "in light of the whole proceeding," that "the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.***

¶26 In the first instance, the State asked an officer a follow-up question concerning his answers to trial counsel's questions about evidence collection. The State said: "Now, you indicated that you didn't take any fingerprint evidence or any DNA blood evidence. Why didn't you do that?" In response, the officer gave the following answer, which was interrupted by the trial court:

> [Officer]: Because the victim in this offense identified the defendant as being the person who committed those crimes and as being the only person there and that those --
>
> THE COURT: Okay. I'm stopping right now this answer and let me see the attorneys at side-bar.
>
> (An off-the-record side-bar was held.)
>
> THE COURT: Okay. I'm striking the last question and answer. You need to just ask something different. This jury can rely on the testimony directly from the person and not things told by other people, and that's the rules. So go ahead.

¶27 Later, outside the jury's presence, trial counsel moved for a mistrial based on the officer's answer. The trial court denied the motion, explaining:

> I don't think it rises to the level of mistrial. I've told the jury over and over again that they can't rely on hearsay, I've defined it for them, that they can only rely on what people themselves observe….
>
> … I did strike it as well and I've said it over and over again. So hopefully that suffices. I think that the case law is clear that juries are able to follow instructions, and I think that they can … follow that instruction to strike and … not take into consideration what was essentially an identification of the defendant by the victim in response to the question.

¶28 On appeal, Hall argues that the trial court erroneously exercised its discretion by not declaring a mistrial. He explains:

> Here, the identification of the individual who caused K.J.'s injuries is key to the State's whole case.

> Without direct evidence or testimony indicating that Mr. Hall was the assailant, the State's case rested on circumstantial evidence. The jury should have only been allowed to consider the contents of the 911 call from N.R. and the responding officers' actual observations. The possibility for doubt, based on this limited evidence, was likely extinguished upon the introduction of this hearsay statement; that it was the defendant who committed the crimes. When compared with all the evidence as a whole, this is the most damning piece. The introduction of such was so prejudicial as to violate Mr. Hall's right to a fair trial. As such, it was likely an erroneous use of discretion by the court to not declare a mistrial.

¶29 In response, the State argues that "[a]ny prejudice here was neutralized by the fact that on the 911 call, which the jury heard, K.J.'s mother specifically identified Hall as the person fighting with K.J." The State rejects Hall's suggestion that but for the officer's disallowed statement that K.J. had identified Hall as her attacker, Hall would have "stood a good chance of being acquitted." The State argues that "[i]n light of all of the evidence, including N.R.'s explicit identification of him during the 911 call," it was not an erroneous exercise of discretion to deny the motion for mistrial.

¶30 Hall has not persuaded us that the trial court erroneously exercised its discretion when it denied his motion for a mistrial. The trial court promptly interrupted the witness, struck his testimony, and immediately instructed the jury not to rely on the direct testimony. Later, at the end of the trial, the trial court also instructed the jury using the standard jury instruction for stricken testimony, directing them to "[d]isregard all stricken testimony." *See* WIS JI—CRIMINAL 150 (2000). "The jury is presumed to follow all instructions given." ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

¶31 Also, as the State points out, the jury had already heard N.R. identify Hall as K.J.'s attacker. In addition, the jury heard evidence that Hall fled when

officers came to find him. The jury was instructed that evidence had "been presented relating to the defendant's conduct after the alleged crime was committed" and that the jury could decide "[w]hether the evidence shows a consciousness of guilt, and whether consciousness of guilt shows actual guilt." *See* WIS JI—CRIMINAL 172 (2000).

¶32 The trial court's instructions to the jury and the existence of other admissible evidence indicating Hall was K.J.'s attacker (*i.e.*, N.R.'s statements to the 911 operator) persuade us that the trial court did not erroneously exercise its discretion when it determined that the claimed error was not "sufficiently prejudicial to warrant a new trial." *See* ***Doss***, 312 Wis. 2d 570, ¶69.

¶33 The second instance where Hall argues the trial court should have declared a mistrial occurred when an officer testified that K.J. "had been punched." Trial counsel objected on grounds that the officer was drawing a conclusion about the cause of K.J.'s injury. The trial court sustained the objection. While Hall now asserts that the trial court should have declared a mistrial, trial counsel never moved for a mistrial, so the issue was not preserved, as the State points out in its brief. In his reply brief, Hall suggests that because trial counsel "did not specifically move for a mistrial," this court should consider whether trial counsel's performance was deficient. We decline to consider Hall's belated argument alleging trial counsel's ineffectiveness. *See* ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396 ("This court need not address arguments that are raised for the first time on appeal."); ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995) (we do not consider arguments raised for the first time in a reply brief).

¶34 For the foregoing reasons, we reject Hall's arguments that the trial court erred by not granting a mistrial. Having rejected these arguments, as well as Hall's arguments concerning the admission of the 911 call and ineffective assistance, we affirm the judgment and the order.

By the Court.—Judgment and order affirmed.

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