COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2210-CR **Cir. Ct. No. 2014CF267**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEBRADRE D. JACKSON,

DEFENDANT-APPELLANT.

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

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Debradre Jackson appeals pro se a judgment convicting him of substantial battery as a repeater.[1] He also appeals an order denying his motion for postconviction relief. Jackson raises three issues on appeal: (1) whether admission of recordings of two 911 emergency calls from the victim violated his right to confront witnesses against him;[2] (2) whether the evidence presented at trial was sufficient to support the conviction; and (3) whether the circuit court properly applied the repeater penalty enhancer at sentencing. For the reasons discussed below, we conclude that Jackson's confrontation rights were not violated by admission of the 911 recordings, that the evidence sufficiently supports the verdict, and that the circuit court properly applied the repeater penalty enhancer at sentencing. Accordingly, we affirm the judgment of conviction and the order denying postconviction relief.

Background

¶2 Jackson was charged with robbery by use of force and aggravated battery against C.B. Both charges included repeater and domestic abuse surcharge[3] enhancers. Jackson represented himself at trial, as he does on appeal. Following trial, Jackson was acquitted of the robbery count. At sentencing, the circuit court dismissed the requested domestic abuse surcharge enhancer, concluding that the State had not met its burden of proof with regard to the requisite "domestic relationship" and "domestic abuse" qualifiers.

[1] See WIS. STAT. §§ 940.19(2) and 939.62(1)(b) (2011-12). All further references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] *See* U.S. CONST. amend. VI; WIS. CONST. art. 1, § 7.

[3] *See* WIS. STAT. § 968.075(1)(a) (2011-12).

¶3 The victim, C.B., did not testify at trial. To prove its case, the State relied instead on testimony from one of the officers who arrived on the scene following C.B.'s calls to 911, the emergency room doctor who treated C.B., and recordings of the two calls C.B. made to the 911 call center following the assault. Jackson did not testify.

¶4 The 911 recordings provide two key pieces of information. The first recording establishes that the assault against C.B. occurred. The second recording establishes that Jackson was the perpetrator and that he had injured C.B., striking her with a vase.

¶5 One of the responding police officers testified that, upon his arrival, C.B. was standing in the doorway of her apartment and had a "severe laceration" on her forehead and near her eye, both of which were bleeding. The officer noted that C.B. had a large amount of dried blood on her face and chest, and that her shirt was ripped away from her body, as though it had been ripped in a struggle. The officer testified that C.B. was crying and scared. The officer described large amounts of blood on the floor and indications of a struggle, as well as items strewn all about the bedroom. The officer testified that he found a vase with blood on it in the bathroom, and identified several photographs of the apartment and of C.B. following the assault, which were admitted into evidence. Finally, the officer identified the vase that he had secured as evidence and described as "pretty heavy," which was admitted into evidence and displayed to the jury.

¶6 The emergency room doctor described C.B.'s injuries as lacerations that required nine stitches and derma-bond, a glue, to close, a contusion to the head, and swelling on her left cheek. The doctor also testified that C.B. advised him that she had been struck with a glass vase by her ex-boyfriend and that she

had lost consciousness for some period of time. C.B. also indicated that she was suffering from a headache and dizziness.

Confrontation Clause Challenge

¶7 Jackson challenges the admission of the 911 recordings on confrontation clause grounds. The circuit court concluded that, pursuant to ***Davis v. Washington***, 547 U.S. 813 (2006), the 911 calls were not "testimonial"; therefore, admission at trial would not implicate Jackson's confrontation clause rights. We agree.

¶8 "[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 the trial if those statements are 'testimonial' and the defendant has not had 'a prior opportunity' to cross-examine the out-of-court declarant."[4] ***State v. Rodriguez***, 2006 WI App 163, ¶12, 295 Wis. 2d 801, 722 N.W.2d 136 (quoted source omitted). Whether admission of an out-of-court statement violates Jackson's right to confrontation is a question of law that we review de novo. ***Id.***, ¶13.

¶9 In ***Davis***, the Court specifically considered whether a 911 call is "testimonial" for confrontation clause purposes and concluded that "[a] 911 call … is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance," ***Davis***, 547 U.S. at 827 (second set of bracketing in original), and, therefore, is not generally "testimonial" in nature. ***Id.*** at 827-29. As particularly relevant to the issue in the case before us, in evaluating the nature of the 911 evidence before it, the ***Davis***

[4] C.B. did not testify at the preliminary hearing either.

Court explained: "[T]he nature of what was asked and answered [in the course of the 911 call], … viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn … what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant ...." ***Id.*** at 827; *see also* ***Rodriguez***, 295 Wis. 2d 801, ¶¶18, 23, 26.[5]

¶10 We are satisfied that C.B.'s statements to the 911 call operator were made with the intent to resolve the present emergency in which C.B. found herself engulfed, not for purposes of implicating Jackson at a later court proceeding. Therefore, we conclude that admission of the evidence at trial did not violate Jackson's confrontation rights and that the jury properly heard the evidence.

Sufficiency Of The Evidence

¶11 We review the sufficiency of the evidence in the light most favorable to sustaining the conviction, ***State v. Hanson***, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390, and will sustain the conviction unless "it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt," ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If more than one inference can be drawn from the evidence, we adopt the

[5] ***State v. Rodriguez***, 2006 WI App 163, 295 Wis. 2d 801, 722 N.W.2d 136, recognizes that 911 calls "serve ... a dual role—the dichotomy between finding out what *is* happening as opposed to recording what *had* happened." ***Id.***, ¶23. The court explained: "[T]he out-of-court declaration must be evaluated to determine whether it is, on one hand, overtly or covertly intended by the speaker to implicate an accused at a later judicial proceeding, or, on the other hand, is a burst of stress-generated words whose main function is to get help and succor, or to secure safety, and are thus devoid of the 'possibility of fabrication, coaching, or confabulation.'" ***Id.***, ¶26 (quoted source omitted).

inference that supports the conviction. ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557.

¶12 The circuit court instructed the jury, without objection, that, in order to convict Jackson of substantial battery,[6] it must find beyond a reasonable doubt (1) that Jackson caused substantial bodily harm to C.B., and (2) that Jackson intended to cause bodily harm to C.B. The court also instructed the jury that "[s]ubstantial bodily harm means bodily injury that requires stitches," and that "[b]odily harm means physical pain or injury, illness or any impairment of physical condition." With regard to intent, the court instructed that the jury is permitted to find "intent" from "the Defendant's acts … and from all the facts and circumstances in this case bearing upon intent," and that intent "means the Defendant had the mental purpose to cause bodily harm … or was aware that his conduct was practically certain to cause bodily harm." Finally, the jurors were instructed that, in weighing the evidence, they were permitted to "take into account matters of your common knowledge, and … observations and experiences in the affairs of life." After reviewing the record at trial, we conclude that the State met its burden of proving that Jackson committed substantial battery against C.B. beyond a reasonable doubt.

¶13 Jackson's primary challenge to the sufficiency of the evidence is aimed at the identification evidence, and turns, in large part, on our resolution of the confrontation clause issue and determination that the 911 recordings in which C.B. identifies Jackson as her assailant were properly admitted as evidence at trial.

[6] Substantial battery is a lesser-included offense of aggravated battery. The jury was instructed on both, and convicted Jackson of the lesser-included offense of substantial battery.

Jackson argues that, because C.B. did not appear as a witness at trial, the State cannot prove its case. We disagree.

¶14 At the outset of trial, the circuit court advised the jury that Jackson and the State had entered into an agreement that provided that the defendant's name is "Debradre Jackson," and that the jury was to take that fact as conclusively proven. During one of the 911 calls, C.B. identified "Debradre Jackson" as her assailant. While the 911 recording is somewhat muffled and C.B. is difficult to understand at times, the recording is sufficient to, at the very least, permit the jury to conclude that C.B. responded "Debradre Jackson" when asked who her assailant was, despite the 911 operator's expressed difficulty in spelling the name. Jackson, in support of his identification defense, argued in closing that he heard C.B. say "Brandon" on the 911 recording. The jury, however, was free to reject Jackson's rendition of the name of the assailant C.B. offered, and did.

¶15 The "substantial bodily harm" element is easily satisfied by the emergency room doctor's testimony that he closed C.B.'s facial lacerations, using nine stitches. Similarly, the "bodily harm" element is met both by the emergency room doctor's testimony that C.B. suffered lacerations and a head contusion, as well as a headache, and the police officer's testimony that C.B. had two facial lacerations that were bleeding when he arrived on the scene and, further, that C.B. was crying when the officer arrived. The 911 recordings support a reasonable inference that C.B. was in pain at the time she made the call. Finally, the jury viewed photographs that depicted C.B.'s bloodied face immediately following the assault.

¶16 The causation element is sufficiently supported by C.B.'s 911 call recording indicating that Jackson had hit her with a vase. C.B.'s statement is

corroborated by the police officer's testimony that the officer discovered a blood-spotted vase at C.B.'s apartment, as well as by the emergency room doctor's testimony that C.B. told him that her ex-boyfriend hit her with a glass vase.

¶17 Jackson mistakenly argues that the State was required to prove that he intended to cause "substantial bodily harm" to C.B. Instead, pursuant to the governing statute and jury instruction, the State was required to prove that Jackson intended to cause "bodily harm" to C.B. *See* WIS. STAT. § 940.19(2). Thus, the jury was required to determine whether Jackson intended to cause physical pain or injury to C.B., and was advised that it could make this determination by considering Jackson's acts and other surrounding circumstances. Further, the jury was advised that it could find the requisite intent if it found either that Jackson had the mental purpose to cause bodily harm to C.B. or that Jackson was aware that his conduct was practically certain to cause C.B. bodily harm. In this case, the evidence supports a finding by the jury that Jackson hit C.B. in the face with a glass vase that the officer described as being "pretty heavy." This evidence, drawing on common knowledge and life experiences, gives rise to the reasonable inference that, at the very least, Jackson was aware that hitting C.B. in the face with a heavy glass vase was practically certain to cause C.B. physical pain or injury.

¶18 We are satisfied that the evidence presented at trial was sufficient to support the conviction for substantial battery beyond a reasonable doubt.[7]

[7] Jackson also raises an evidentiary issue within the context of his sufficiency of the evidence argument. Jackson alleges that, because the circuit court concluded at sentencing that the domestic abuse surcharge could not be assessed due to the State's failure to prove the necessary prerequisites, the several references to "domestic abuse" or "domestic violence" amounted to prejudicial error. The State points out that Jackson did not object to the references at (continued)

Repeater Penalty Enhancer

¶19 Finally, Jackson argues that because the circuit court did not receive into evidence at the sentencing hearing the certified copy of the judgment of conviction that supports imposition of the repeater penalty enhancer and the State did not specifically request that the court take judicial notice of the certified copy that the State proffered, the repeater allegation was not properly proven pursuant to WIS. STAT. § 973.12(1). Upon our de novo review of the record, *see* ***State v. Koeppen***, 2000 WI App 121, ¶36, 237 Wis. 2d 418, 614 N.W.2d 530, we conclude that the circuit court took judicial notice of the proffered certified copy of the Ozaukee County judgment of conviction[8] and properly imposed the repeater penalty enhancer.

¶20 At sentencing, the circuit court indicated that it had in hand the certified copy of a judgment of conviction and stated: "So the bail jumping was convicted. According to the cert, it's a certified copy from Ozaukee County Courts, April 10, 2012, felony bail jumping for Mr. Jackson. Why don't we show this to him …. So I am finding that that certified copy does indicate that Mr. Jackson was convicted of a felony within five years of January 10, 2014, which remains of record and unreversed." On the basis of the certified judgment of

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trial, and suggests that the failure to object should result in forfeiture of review of the alleged error, citing ***State v. Hansbrough***, 2011 WI App 79, ¶25, 334 Wis. 2d 237, 799 N.W.2d 887. We agree with the State that Jackson has forfeited review as a result of his failure to object at trial. We also conclude that admission, even if error, did not prejudice Jackson or undermine the integrity of the jury's verdict in any respect.

[8] The certified copy of the judgment of conviction is not included in the appellate record. The absence of the certified copy does not affect our review of the issue. *See* ***State v. Koeppen***, 2000 WI App 121, ¶37, 237 Wis. 2d 418, 614 N.W.2d 530. Jackson includes a copy of the judgment of conviction in his appendix.

conviction, the court found Jackson to be a repeater pursuant to WIS. STAT. § 939.62(1)(b).

¶21 In ***Koeppen***, we held that repeater status is properly proven when a circuit court takes judicial notice of a certified copy of a judgment of conviction. ***Koeppen***, 237 Wis. 2d 418, ¶37. There is no requirement that the certified copy be moved into and received as evidence. The record here establishes that Jackson viewed the certified copy and did not object to its use for sentencing purposes after viewing it. Although the circuit court did not specify that it was taking "judicial notice" of the certified copy pursuant to WIS. STAT. § 902.01, neither the case law nor the statute requires that the court recite the magic words "judicial notice" upon reviewing the certified copy of the judgment of conviction and prior to making its finding that the alleged repeater status is adequately proven.

¶22 We are satisfied that Jackson's alleged repeater status was adequately proven at sentencing and that the judgment of conviction properly reflects the imposition of the repeater penalty enhancer.

By the Court.—Judgment and order affirmed.

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