COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP80-CR **Cir. Ct. No. 2012CF867**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA P. BRAITHWAITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. A jury found Joshua P. Braithwaite guilty of the murder, sexual assault, and kidnapping of 20-year-old L.Z. Braithwaite appeals his conviction on the grounds that the trial court erroneously exercised its

discretion when it denied his motion for a mistrial after Braithwaite's probation agent revealed to the jury Braithwaite's prior adjudication for a sexual offense. As we conclude that the trial court properly exercised its discretion in denying Braithwaite a mistrial, we affirm.

¶2 Braithwaite was charged with first-degree intentional homicide, first-degree sexual assault, and kidnapping, all with use of a dangerous weapon and as a repeater, after L.Z.'s partially burned body was discovered in a Kenosha park. Prior to trial, the State filed an "other acts" motion, seeking to introduce evidence of Braithwaite's prior juvenile adjudication involving a home invasion and first-degree sexual assault of a child in 2004. The trial court denied the "other acts" motion, determining that the new charges were "significantly dissimilar" from the previous case and that any probative value substantially outweighed the danger of unfair prejudice.

¶3 During the ten-day trial, multiple witnesses, experts, and Braithwaite himself testified. On the sixth day of trial, Braithwaite's probation agent, John Langdon, testified for the State and recounted to the jury how Braithwaite had missed a scheduled meeting with Langdon on the morning of the murder. Langdon's testimony on the stand was unremarkable, but it was his nonverbal statements to the jury that ultimately caught the court's attention.

¶4 After the close of evidence, two members of the fourteen-member jury were excused from deliberations as alternates. One of the State's "victim/witness employees" contacted the released jurors and learned that the jurors were able to make out "some information about sex or sex offender" written on Langdon's files that he brought to court. The State shared the information with defense counsel and the court. The court, in concert with the parties, decided to

"see the verdict through" as it believed that the verdict would be impacted if the court interrupted deliberations to voir dire the jury. The court reasoned that if there was a finding of not guilty, then it would have eliminated the need to continue to discuss the issue.

¶5 The jury ultimately found Braithwaite guilty of all charges. After the verdict was read and the jury polled, the court addressed the issue of Langdon's file. The court explained to the jury that Langdon "carried two files to the witness stand when he testified. I want to know whether anyone saw any words located on any of those files when he did go to the witness stand and testify." Seven of the twelve jurors raised their hands. The court conducted individual voir dire of all the jurors in the presence of the State, the defendant, defense counsel, and a member of the press. After the third juror, the defense made an oral motion for a mistrial, which the court took under advisement so it could complete voir dire of all the jurors.

¶6 The court asked each juror a variation of two questions: (1) what, if anything, did you see on Langdon's folder, and (2) if you saw any information on the folder, were you able to set it aside to reach a verdict in the case? Although only seven jurors admitted seeing the writing on the file, the court learned during the postverdict voir dire that the jurors had discussed the information during deliberations. All the jurors reported that they were able to set aside the information gleaned from Langdon's files, that it did not affect their impression of Braithwaite, and that it did not have an impact on the verdict. The court denied Braithwaite's motion for a mistrial, stating its belief, after "a properly conducted voir dire of all the jurors independently one at a time," that all the jurors indicated that the information on Langdon's file "did not influence their decision making in this trial."

¶7 Braithwaite asserts that the trial court improperly exercised its discretion in denying his motion for a mistrial, arguing that knowledge of his prior sexual offense "cannot simply enter a juror's mind and then immediately zoom out and never be considered again" as "[t]he stakes are simply too high." Whether to grant a motion for a mistrial is within the sound discretion of the trial court and will be reversed only on a clear showing of an erroneous exercise of discretion. ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). "The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial." ***Id.***

¶8 Not all trial errors warrant granting a mistrial as "the law prefers less drastic alternatives." *See* ***id.*** at 512. We conclude that the trial court properly exercised its discretion in denying Braithwaite's mistrial motion. The trial court did everything right under the circumstances: it provided limiting jury instructions, conducted individual voir dire of the jurors, and obtained assurances from each juror that the information on Langdon's folders did not impact the verdict. *See* ***Johnson v. State***, 75 Wis. 2d 344, 366, 249 N.W.2d 593 (1977).[1]

¶9 Voir dire revealed that the subject of Langdon's folders was addressed very briefly during deliberations and discounted by the jurors just as quickly. The jury foreperson spoke up during the discussion to remind the jurors "that [the information on the folder] was not something that we could consider in testimony and we went on." Several other jurors agreed, indicating that "I was

[1] The State claimed no involvement with Langdon's action of bringing Braithwaite's files to court. The court accepted the State's position that there was no prosecutorial misconduct, and as there is no evidence to the contrary, we affirm. *See* ***State v. Kettner***, 2011 WI App 142, ¶25 n.6, 337 Wis. 2d 461, 805 N.W.2d 132 (explaining that a trial court's findings of fact on a mistrial motion are upheld unless clearly erroneous).

telling them that it's not admitted evidence, that we shouldn't consider that" and we "all discussed it. Kind of made the determination that that's irrelevant to what we're dealing with. That's what he did in his past is his past. And we made it clear between all of us, very clear, it had no bearing on this case."

¶10 Braithwaite, however, identifies statements made by juror two in support of his position.[2] Juror two stated, "It was so deliberate to me for [Langdon] to do that, to taint us, that's how I felt." Juror two went on to explain that during deliberations "somebody had said: Well … he's probably done this before" and elaborated that "I think it changes everybody's perception because the thought process is, if this is his history, then he probably did it. And it's supposed to be innocent until proven guilty, and it just rubbed me the wrong way…. [I]t was showcased to get a conviction and that's what rubbed me the wrong way." When asked, however, whether he was able to set aside the information on the folder to reach the verdict, juror two responded: "Yeah, I think so." The trial court, while calling juror two "very active," found that the juror was able to "set aside any feelings he might have had." The court's findings were not clearly erroneous. ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199 ("We will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous." (citation omitted)).

[2] Braithwaite also identified statements by juror number twelve, who had not originally seen the words on Langdon's folder but was part of the discussion during deliberations. Juror twelve explained that when the juror "first heard it, my very first instinct was: Oh, he must have had another case with a lady." The juror, however, clearly accepted the instruction that the sticker was not evidence, noting that "I don't want to put somebody, you know, in jail or whatnot because I listened to something like that. So at that point I was like no, it's out of my mind." The trial court accepted that the discussion during deliberations did not affect juror twelve's perception of the defendant or affect juror twelve's decision on the verdict. We accept those findings.

¶11 Braithwaite also identifies the "lack of any cautionary instruction, by the court, to the jury regarding the prejudicial information" in this case. Braithwaite attempts to distinguish this case from the result in ***Johnson***, 75 Wis. 2d at 363, where our supreme court agreed that granting a mistrial was not required after police reports referencing certain sex offenses and the defendant's mental health history were inadvertently sent into the jury room, and ***State v. Pankow***, 144 Wis. 2d 23, 46-47, 422 N.W.2d 913 (Ct. App. 1988), where this court determined that a mistrial was not appropriate where other acts evidence was incorrectly provided to the jury. In both cases, the jury was provided cautionary instructions prior to reaching a verdict. ***Johnson***, 75 Wis. 2d at 364-65 (jury was told to disregard the documents before returning to deliberations); ***Pankow***, 144 Wis. 2d at 46 (the testimony was stricken and the jury was told to disregard it).

¶12 Under the circumstances, we disagree with Braithwaite; the trial court provided the jury with cautionary instructions, albeit indirect ones as the scope of the issue was not known until the jury was already done deliberating. Braithwaite testified and acknowledged that he had four previous convictions—a number determined by the court after arguments from the parties.[3] The court instructed the jury that "[e]vidence has been received that the defendant has been convicted of crimes…. [Y]ou should bear in mind that a criminal conviction at some previous time is not proof of guilt of the offense now charged." The court also instructed the jury to consider only the evidence received during the trial.

[3] Braithwaite had fourteen previous convictions—two adult convictions and twelve juvenile adjudications. Defense counsel argued that the juvenile adjudications were not relevant to the current charges and were over ten years old. The trial court determined that Briathwaite's most recent juvenile adjudications, in 2004, for first-degree sexual assault of an eleven-year-old girl during a home invasion and burglary, should be considered adjudications for the purpose of a credibility determination.

¶13 The jury members clearly understood the court's instructions given their collective comments during postverdict voir dire. "When a circuit court gives a proper cautionary instruction, appellate courts presume that the jury followed that instruction and acted in accordance with the law." ***State v. Gary M.B.***, 2004 WI 33, ¶33, 270 Wis. 2d 62, 676 N.W.2d 475. Braithwaite presents no evidence that the jurors failed to follow the court's instructions. We conclude that it is clear from postverdict voir dire that the jurors did not consider Braithwaite's prior history of a sexual offense as evidence they could consider with respect to his current charges.

¶14 The jury's knowledge that the defendant had a prior adjudication for a sexual offense was not sufficiently prejudicial to warrant a new trial. The trial court properly provided limiting jury instructions, conducted individual postverdict voir dire of the jurors, and obtained assurances from each juror that the information on Langdon's folders did not impact the verdict. There was also sufficient evidence adduced at trial to support the jury's finding of Braithwaite's guilt. The trial court properly exercised its discretion in denying Braithwaite's motion for a mistrial.

By the Court.—Judgment affirmed.

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