COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2485-CR **Cir. Ct. No. 2002CF33**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYNE ARIC MORK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed*.

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Wayne Aric Mork appeals a judgment of conviction for first degree sexual assault of a child and an order denying his motion for postconviction relief. Mork argues that the State's expert witness inappropriately vouched for and bolstered the credibility of the alleged child

victim, thereby depriving Mork a fair trial. He argues that the admission of the expert's testimony constitutes plain error entitling him to a reversal of the judgment of conviction. In the alternative, he requests discretionary reversal and a new trial in the interest of justice, claiming that the real controversy was not fully tried. Assuming, without deciding, that it was error to admit certain parts of the expert's testimony, we conclude Mork has not demonstrated plain error. We also conclude Mork is not entitled to a new trial in the interest of justice. We therefore affirm the judgment of conviction and the order denying postconviction relief.

BACKGROUND

¶2 Mork was charged with sexually assaulting A.S.R., a three-year-old girl. The jury found him guilty and he was sentenced to fifteen years' initial confinement, followed by ten years' extended supervision. Mork moved for postconviction relief, asking the court to vacate his conviction and grant him a new trial, arguing that the State's expert witness, Dr. Beth Huebner, inappropriately vouched for and bolstered A.S.R.'s credibility. Recognizing that his trial counsel may not have properly objected to Huebner's testimony at trial, Mork sought reversal and a new trial under WIS. STAT. § 901.03(4) (2003-04),[1] the plain error statute, or under WIS. STAT. § 751.06, which allows discretionary reversal in the interest of justice by the supreme court. The circuit court denied Mork's postconviction motion for a new trial, finding that his defense counsel had not preserved his challenge by timely objection, and that Dr. Huebner's testimony was properly admitted. Mork appeals.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

DISCUSSION

¶3 The issue on appeal is whether it was plain error for the State to have elicited testimony from Dr. Huebner which, according to Mork, served to vouch for A.S.R.'s veracity and buttress the credibility of her statements that Mork sexually abused her. Thus, the legal principles we apply in this case relate to the admissibility of expert testimony and the plain error doctrine.

¶4 WISCONSIN STAT. § 907.02 governs the admissibility of expert testimony. The statute provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *See also* ***State v. Friedrich***, 135 Wis. 2d 1, 15, 398 N.W.2d 763 (1987). While we generally defer to the trial court's discretion in its decision whether to admit expert testimony, ***id.***, whether one witness's testimony constituted improper commentary on the credibility of another witness is a question of law, which we review de novo. ***State v. Davis***, 199 Wis. 2d 513, 519, 545 N.W.2d 244 (Ct. App. 1996).

¶5 Mork argues that the trial court violated WIS. STAT. § 907.02 by admitting certain parts of Dr. Huebner's expert testimony. In his view, Dr. Huebner inappropriately vouched for and bolstered A.S.R.'s credibility, thereby depriving him of a fair trial. The State argues that Mork waived his right to appeal the admission of Huebner's expert testimony by failing to object to its admission. We agree. Mork did not object to the admission of Dr. Huebner's testimony before or during trial; he therefore has waived his right to appeal on that ground. *See* ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537 ("parties waive any objection to the admissibility of evidence when

they fail to [object] before the circuit court").[2] However, Mork turns to the plain error doctrine as a means of bringing the issue before us in this appeal. We therefore turn to the plain error doctrine to determine whether the admission of Dr. Huebner's testimony warrants reversal of the judgment of conviction entered against Mork. We conclude that it does not.

Plain Error Doctrine

¶6 WISCONSIN STAT. § 901.03(4) provides a "plain error" exception to the waiver rule, allowing us to take notice of a plain error affecting substantial rights even where the defendant failed to object to the error at trial. WIS. STAT. § 901.03(4);[3] *see also* ***State v. Street***, 202 Wis. 2d 533, 552, 551 N.W.2d 830 (Ct. App. 1996). Plain error has been described as "'error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.'" ***Virgil v. State***, 84 Wis. 2d 166, 191, 267 N.W.2d 852 (1978) (quoting 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 851 (1st ed. 1969)). The error must be so fundamental, obvious, and substantial or grave as to require a new trial or other relief. ***State v. Street***, 202 Wis. 2d at 552. While appellate courts find plain error "impossible to define," "they know it when they see it." ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984) (citation omitted). This doctrine, reserved for cases where a constitutional right is denied, is to be used sparingly. ***Id.*** Ordinarily we would

[2] We also observe that Mork does not argue ineffective assistance of trial counsel for failing to object to the admissibility of Dr. Huebner's testimony.

[3] WISCONSIN STAT. § 901.03(4) states: "PLAIN ERROR. Nothing in this rule precludes taking notice of **plain errors** affecting substantial rights although they were not brought to the attention of the judge." (Emphasis added.)

first determine whether the trial court committed error by admitting the objected parts of Dr. Huebner's testimony, and, if so, whether that error was "plain". However, for purposes of this appeal, we assume, without deciding, that it was error to admit those portions of Huebner's testimony Mork specifically identifies. Assuming it was error to admit this testimony, we nonetheless conclude that Mork has not demonstrated that the trial court committed plain error.

¶7 First, we observe that Mork does not develop his plain error argument until his reply brief.[4] Even then, his entire plain error argument rests on the assertion that his constitutional right to a fair trial as secured by the Fifth and Fourteenth Amendments to the U.S. Constitution was violated by the admission of Huebner's testimony. More specifically, Mork argues that Huebner "continuously compar[ed] the alleged victim's actions with behavior of victims of the same type of crime …." By testifying in this manner, Mork asserts, Huebner vouched for and bolstered A.S.R.'s credibility, substantially impairing his right to a fair trial. The flaw in this argument is that the supreme court in ***State v. Jensen*** held that an expert witness may offer this type of opinion testimony if it assists the trier of fact to understand the evidence or to determine a fact in issue. ***State v. Jensen***, 147 Wis. 2d 240, 245-56, 257, 432 N.W.2d 913 (1988). Thus, Mork's only plain error objection to Huebner's testimony, which was broadly stated, is expressly permitted under Wisconsin case law.[5]

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[4] In his opening brief, Mork's plain error argument consists of two sentences. Although we note that he provides a more developed argument on this topic in his reply brief, Mork, as we discuss above, fails to discuss Huebner's testimony in the context of plain error. Indeed, Mork's plain error discussion in his reply brief is just slightly more developed than in his original brief.

[5] Mork also argues, citing to ***State v. Pete***, 1987AP1106-CR, unpublished slip op. (WI June 9, 1988), that Huebner improperly listed ten symptoms or behaviors exhibited by other children who were sexually abused and then compared their behaviors with A.S.R.'s. There are

(continued)

¶8 In addition, to the extent Mork argues plain error, he fails to apply Wisconsin case law on plain error to Huebner's testimony or explain how admitting Huebner's testimony constituted plain error. Mork's principal arguments focus on why it was error to admit the objectionable aspects of Huebner's testimony; Mork fails to scrutinize this testimony under the plain error doctrine.[6]

Discretionary Reversal

¶9 In the alternative, Mork seeks reversal by requesting that we exercise our discretionary authority under WIS. STAT. § 752.35[7] and grant him a new trial in the interest of justice because, in his view, the real controversy has not been fully tried. Section 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried,

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two problems with this argument. First, by citing to ***Pete***, Mork violates WIS. STAT. § 809.23, which prohibits citation to an unpublished opinion, with two exceptions not applicable here. In addition, ***Pete*** was decided before ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988), which expressly permits this type of expert opinion testimony. Ironically, ***Pete*** also discussed the inappropriateness of citing to unpublished opinions. ***Pete***, 1987AP1106-CR at n.1 Mork's counsel are informed that future violations of this statute may result in appropriate sanctions.

[6] Mork attacks the State's argument that Huebner's testimony was presented to rebut Mork's contention that A.S.R. was prompted to make false allegations. Because we assume without deciding that it was error to admit those parts of Huebner's testimony Mork takes issue with, we need not address this argument.

[7] We note that Mork mistakenly cites WIS. STAT. § 751.06 for our discretionary authority to grant a new trial in the interest of justice. WISCONSIN STAT. § 751.06 governs the state supreme court's discretionary reversal powers, not ours. In spite of having been informed of this mistake by the State in its appellate brief, Mork inexplicably continues to cite this statute as providing the court of appeals the discretionary authority to grant a new trial in the interest of justice. However, since, as the State recognizes, the discretionary reversal powers are identical under the two statutes, decisions interpreting either are applicable in a WIS. STAT. § 752.35 case. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

> the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

We exercise our power of discretionary reversal only in extraordinary cases. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶10 Mork does not fully develop this argument. We therefore do not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.