COURT OF APPEALS DECISION DATED AND FILED

August 10, 2010

A. John Voelker
Acting 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. 2010AP780-CR **Cir. Ct. No. 2009CM1019**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIK B. HUDSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed*.

¶1 BRUNNER, J.[1] Erik Hudson appeals a judgment of conviction for battery and disorderly conduct, both as a repeater and as domestic abuse. He

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

argues the trial court erred by failing to instruct the jury to disregard spontaneous and unresponsive testimony of the victim, Venze Finley. We affirm.

¶2 As Finley was cross-examined at trial about the circumstances of the battery, the following exchange took place:

> [Hudson's Attorney]: And [Hudson] immediately charged you?
>
> [Finley]: Yes.
>
> [Hudson's Attorney]: Grabbed you by the throat?
>
> [Finley]: Grabbed me by my throat and kept throwing me on the bed. He constantly kept doing it, and I kept asking him to stop and he didn't.
>
> I just want to go and get out of here.
>
> And I think through all this situation is all he did was like me. He would walk in the bathroom when I was taking showers. I would –
>
> [Hudson's Attorney]: Your Honor, I object.
>
> [Finley]: Can I go? I just want to go. Can I go? Because he did everything I'm saying, and you people, all you are talking about is drugs. There's no situations about drugs or anything.
>
> [The Court]: Please only respond to the questions.
>
> [Finley]: Yes. I'm ready to go. He did it, and I don't care, and I don't care.

The circuit court again admonished Finley to answer only the question asked and, after a brief recess, the attorneys consented to resume questioning. Hudson did not request Finley's unresponsive testimony be stricken. Consequently, the circuit court rejected Finley's proposed jury instruction on the subject.

¶3 Hudson asserts it was plain error for the circuit court not to strike Finley's unresponsive testimony, or admonish the jury to disregard it. WISCONSIN

STAT. § 901.03(4) codifies the "plain error" doctrine, which permits appellate courts to review errors that were otherwise forfeited by a party's failure to object. ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. An error must be fundamental, obvious, and substantial to constitute plain error. ***Id.*** Accordingly, the plain error doctrine is used sparingly. ***Id.***

¶4 There is no bright-line rule to determine whether reversal is warranted, and the existence of plain error turns on the facts of the particular case. ***Id.***, ¶22. In ***Jorgensen***, the supreme court found plain error where the circuit court read to the jury from a transcript of an earlier proceeding, causing multiple errors and depriving the defendant of his confrontation and due process rights.[2] ***Id.***, ¶¶28-33. Important to the court's decision were the significance, timing, repetition, and manner of the errors. ***Id.***, ¶44.

¶5 While the better practice would have been to give the jury a curative instruction immediately following the unresponsive testimony, the circuit court's failure to do so did not constitute plain error. Hudson does not dispute the

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[2] The errors in ***State v. Jorgensen***, 2008 WI 60, ¶28, 310 Wis. 2d 138, 754 N.W.2d 77 (citations omitted), included:

> (1) The admission of other acts such as prior convictions and pending charges for operating while intoxicated. (2) The admission of the fact that a preliminary breath test was conducted and the results of that test. (3) The admission of inadmissible hearsay including "testimony" from the judge and the prosecutor. (4) The admission of information before the jury that was not subject to confrontation, such as the judge's remarks and the prosecutor's commentary regarding the preliminary breath test, their personal observations of Jorgensen on November 10, and their conclusions about Jorgensen's guilt. (5) The prosecutor's assertion of personal knowledge of the facts. (6) The admission of information regarding the judge's participation, including his perceptions and conclusions, at the prior proceeding.

relevance of Finley's statement that Hudson "did it"—presumably meaning he grabbed her by the throat. The very purpose of Finley's testimony was to prove that Hudson did, in fact, commit the charged crimes. The circuit court's failure to strike Finley's unprompted statements that Hudson attacked her did not "unfairly influence the jury's decision and infect the trial with unfairness." *See* ***id.***, ¶24 (citation omitted).

¶6 Finley's remaining unresponsive testimony consisted of her statement that Hudson would walk in the bathroom when she was taking showers. While irrelevant and arguably prejudicial, this single bit of testimony is insufficient to undermine our confidence in the trial's outcome. Finley made the statement only a single time, during what was obviously an emotional moment. Hudson was free to further question Finley on this point if he desired. The circuit court erred by failing to strike or instruct the jury to disregard this testimony, but that error was not so fundamental or substantial to rise to the level of plain error.

¶7 In any event, the State demonstrated that any error was harmless. Harmless error requires the State to prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***Id.***, ¶23. Several factors are relevant to the harmless error inquiry, including the frequency of the error, the importance of the erroneously admitted evidence, and the nature and overall strength of the State's case. ***Id.*** Again, Finley's unresponsive testimony was brief and isolated. It was also unimportant, as her testimony that Hudson "did it" duplicated other properly admitted testimony, and her statement about Hudson walking in the bathroom did not relate to the charges in any way. Having reviewed the trial transcript, we are satisfied the unresponsive testimony did not contribute to the verdict, and conclude a rational jury would have found Hudson guilty even without it.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.