COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0462-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DENNIS M. HEATH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: EARL W. SCHMIDT, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge.

PER CURIAM. Dennis Heath appeals a judgment convicting him of sexually assaulting his girlfriend's sister while she was unconscious. He argues that the court should have suppressed statements he made to the police, that the court improperly exercised its discretion when it allowed the prosecutor to establish on cross-examination that Heath had thirteen prior convictions and that

plain error occurred when the prosecutor elicited from the victim the details of her prior convictions and when he reiterated Heath's statement after the assault "I'm going to go and wash Auntie off." He also raises other issues that are frivolous and rely on facts that are not supported by the record or are misrepresented or exaggerated in his brief. We affirm the judgment.

The victim testified that she was staying with her sister and Heath for a weekend and had been drinking heavily until she passed out. She awoke to find that her clothing had been removed and Heath was having intercourse with her. She pushed Heath off of her and fled to a neighbor's house where she called the police.

The following day an officer found Heath and his daughter at a convenience store. Not wanting to discuss the incident in front of the child, Heath and the officer agreed that the officer would drive them home. There, Heath spoke with the officer, pointed out where the victim was sleeping, identified a pile of clothing on the floor as his, and gave the officer the victim's panties.

Heath was then taken to the police station where the officer advised him of his ***Miranda***[1] rights. Heath signed a typewritten statement stating that while the victim was sleeping, he had pulled down her jeans, that she woke up three minutes after he started having intercourse with her, and that he stopped when the victim asked him to.

At trial, Heath testified that when he went to the couch to have intercourse, he thought the person lying there was his girlfriend, not her sister.

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

When he asked the person whether she wanted to have intercourse with him, he heard her groan "yes." He testified that the victim was conscious and consented to the intercourse.

The court properly refused to suppress statements made by Heath at his home. Because Heath was not in custody, it was not necessary for the police to read him his ***Miranda*** rights before questioning him. *See* ***State v. Armstrong***, 223 Wis.2d 331, 344-45, 588 N.W.2d 606, 612 (1999). The test for determining whether a person is in custody for ***Miranda*** purposes is whether a reasonable person in the suspect's position would have considered himself to be in custody given the degree of restraint under the circumstances. *See* ***State v. Swanson***, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991). The officer had not told Heath that he was under arrest. Heath had not been frisked or placed in handcuffs and was allowed to have a private conversation with his girlfriend. He testified that the portion of his written statement was correct in which he said that he agreed to go to his house, gave permission for the officers to search the house for any evidence they needed, and turned over his and the victim's clothing. A reasonable person in Heath's position would not have believed that he was in custody at that time.

Heath contends that his statements were involuntary. He identifies no police misconduct to support this claim. His testimony at trial and his written statement to the police show that he cooperated with the investigation. The record discloses no improper pressure or intimidation that led to his statements.

Heath argues that statements he made at the police department should be suppressed as fruits of the poisonous tree. He contends that they were tainted by his earlier involuntary statements and evidence improperly seized from

his home. Because we conclude that his earlier statements were admissible, there is no basis for suppressing his later statements.

We need not determine whether the trial court properly exercised its discretion when it allowed the prosecutor to cross-examine Heath as to thirteen previous convictions because the error, if any, was harmless.[2] The convictions were admitted to impeach Heath's credibility. His credibility was already strained by inconsistencies between his testimony and the statements he made to the police. Heath further strained his credibility at trial by claiming that he took the blame in his statements to the police in an effort to preserve the relationship between his girlfriend and her sister. The only issue at trial was whether the victim was conscious and consented, or whether she was asleep at the time intercourse occurred. Heath's statement to the police that she woke up three minutes after intercourse began supports her contention that she was not conscious during the relevant time. Because the State presented strong evidence of Heath's guilt and his testimony was not credible even without considering his prior convictions, we conclude that there is no reasonable possibility that informing the jury of his prior convictions contributed to the verdict. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985).

Heath argues that plain error occurred when the prosecutor elicited details from the complainant regarding her prior convictions and when he reiterated Heath's statement to his girlfriend and her children "I'm going to go and wash Auntie off." "Plain error" is error that affects a defendant's substantial

[2] The court did not specifically consider the four factors for determining whether to allow evidence of prior convictions discussed in ***State v. Kuntz***, 160 Wis.2d 722, 752-53, 467 N.W.2d 531, 542-43 (1991). Had it done so, it might well have excluded at least some of the convictions because the crimes were committed long ago and do not involve dishonesty.

rights. *See* ***State v. Street***, 202 Wis.2d 533, 552, 551 N.W.2d 830, 839 (Ct. App. 1996). The error must be obvious, substantial or grave, and so fundamental that a new trial or other relief must be granted. ***Id***. The plain error rule is reserved for cases in which it is likely that the error denied the defendant a basic constitutional right. ***Id***. The matters raised in this appeal do not constitute error, much less plain error. While the law prohibits a party from cross-examining an adverse witness on the details of his or her convictions, it does not prohibit a party from rehabilitating his own witness by disclosing the nature of the offenses.[3] Furthermore, disclosing the details of the victim's prior convictions does not affect Heath's substantial rights or raise any issue of constitutional dimension. Likewise, the prosecutor's reiterating Heath's statement was proper and, if error, did not constitute plain error. The victim was having her period at the time of the assault and Heath's statement refers to her bodily fluids. Because it was not clear whether the defense would deny that intercourse occurred, the statement had probative value. While the statement was crude, its prejudicial effect did not substantially outweigh its probative value. In addition, even if the trial court would have disallowed the evidence had a proper objection been made, admitting the statement does not constitute plain error.

Other issues raised in Heath's brief are not supported by facts contained in the record. He argues that the court erred when it admitted Officer Heistad's statement that Heath appeared "remorseful, apologetic and cooperative" when he gave the statement to the police. Heath characterizes that response to the

[3] Heath also contends that the prosecutor violated a court order when he asked the victim about the nature of her prior convictions. The record does not support that argument. The court did not preclude either party from rehabilitating witnesses by disclosing the nature of the previous convictions.

prosecutor's question regarding Heath's demeanor as "nothing more than the officer's opinion as to whether or not Mr. Heath was telling the truth." This issue is not properly preserved because it was not raised at trial.[4] In addition, the prosecutor properly elicited evidence regarding Heath's demeanor at the time he made his statements to the police. A description of a person's demeanor is not tantamount to an opinion of his truthfulness. It does not invade the province of the jury or exceed the witness's competency. *See generally*, ***State v. Pittman***, 174 Wis.2d 255, 266-74, 496 N.W.2d 74, 79-82 (1993).

The record does not support the argument that the prosecutor improperly injected his personal opinion into the closing argument when he argued that the complaining witness was credible. In the context of the argument, the prosecutor was merely urging the jury to decide credibility based on what occurred at the trial. He was not personally vouching for the victim's credibility and did not suggest that he had any knowledge of the case beyond what was presented at trial. *See* ***State v. Neuser***, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995).

The victim's statement that Heath engaged in "sexual intercourse" with her was not inadmissible as a legal conclusion. The victim testified that having intercourse meant "his penis was in my vagina." This evidence was sufficiently specific and detailed to support the conviction.

Heath has not established any prejudice from the prosecutor's question whether Heath was familiar with the criminal justice system. The

[4] Heath objected to the question on different grounds at trial that are not pursued on appeal.

defense objected and the prosecutor withdrew the question, but only after Heath answered that he was "somewhat" familiar. We are satisfied that Heath's being somewhat familiar with the criminal justice system did not affect the verdict.

Finally, Heath has established no basis for a reversal in the interest of justice. We conclude that the controversy was fully and fairly tried, that justice has not miscarried and that retrial would not result in a different verdict. *See* § 752.35, STATS.

By the Court.—Judgment affirmed.

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