COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP425-CR **Cir. Ct. No. 2014CF2803**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SIMMIE OMAR HOWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Simmie Omar Howard appeals from an amended judgment of conviction for one count of strangulation and suffocation as domestic

abuse and one count of felony bail jumping, contrary to WIS. STAT. §§ 940.235(1), 968.075(1)(a)1., and 946.49(1)(b) (2013-14).[1] Howard also appeals from an order denying his postconviction motion for a new trial. Howard argues that the trial court committed plain error at trial when it admitted evidence concerning a domestic violence form allegedly signed by the victim when she was interviewed by the police. We conclude that the admission of the evidence was not plain error, and that even if it was, the error was harmless. Therefore, we affirm.

BACKGROUND

¶2 Police officers went to Howard's home in response to a 911 call placed by his girlfriend, J.T., who told the operator that Howard had choked her. The police spoke with both Howard and J.T. Howard was arrested and charged with three crimes: (1) strangulation and suffocation, as domestic abuse (based on J.T.'s claim that Howard choked her); (2) felony bail jumping (based on the fact Howard was on bail for possession of THC, second or subsequent offense, at the time he allegedly committed these new crimes); and (3) misdemeanor battery, as domestic abuse (based on allegations that Howard punched J.T. in the face during their argument).

¶3 The case proceeded to a jury trial. The jury listened to a recording of J.T.'s 911 call, which included J.T.'s statement that Howard had choked her and that she "couldn't breathe." The jury also heard testimony from J.T., who recanted some of the statements she allegedly made to police officers who

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

responded to her 911 call.[2] She testified that she argued with Howard and when she got angry, she "charged at Mr. Howard," which resulted in physical contact when "he tried to get me off of him." J.T. said that she called 911 "to scare Mr. Howard" and that she intentionally scratched her own neck while waiting for police to arrive. J.T. said she told the police officers that she had "[a] verbal argument" with Howard. She denied telling the police officers that Howard choked her, that Howard struck her in the face, that Howard's children "were constantly crying and screaming while this argument was going on," and that her neck was hurting.

¶4 On cross-examination, trial counsel asked J.T. whether she "sign[ed] any sort of sworn statement as to what occurred." J.T. at first said she could not "remember signing anything," but then testified that there was "no written version" of the incident.

¶5 The State presented the testimony of Sergeant Mark Kapusta, who was one of the police officers who responded to the 911 call. He testified about what he observed when he first arrived at the apartment and saw J.T. and Howard together:

> She was scared. She was shaking. You could see it in her body language, and she didn't want to talk. She was very hesitant, and she made it clear that she said she didn't want nothing to happen and that she didn't call the police. I also saw … some redness and swelling on her throat and neck area.

[2] We agree with the State's characterization of J.T.'s testimony: "In both her testimony on direct examination by the prosecutor and her testimony on redirect examination, she steadfastly denied making any statements to the police that might have incriminated Howard."

Kapusta said he took photographs of J.T.'s injuries, and those photographs were shown to the jury.

¶6 Kapusta testified that he concluded there had been an act of domestic violence and directed the second officer to place Howard under arrest and remove him from the apartment. Thereafter, J.T. was "more relaxed" and told Kapusta that she was scared when Howard was still in the apartment. Kapusta said J.T. told him that during the argument she had with Howard, he "hit her in the face with an open and closed hand" and "violently chok[ed] her."

¶7 Kapusta said that as part of his investigation, he asked J.T. to personally fill out a portion of a domestic violence form. Kapusta said that J.T. placed circles on diagrams of a person to indicate where she had been injured.[3] She also circled answers to seven written questions, such as whether she gave Howard permission to injure her. Kapusta also noted that J.T. had signed and dated the form.

¶8 After Kapusta testified about the domestic violence form that J.T. completed, the State moved that the form be admitted into evidence. Trial counsel explicitly stated: "No objection." The trial court then admitted the form.

¶9 Howard took the stand in his own defense. He testified that he and J.T. simply argued and that he was surprised when the police arrived. Howard denied squeezing J.T.'s neck and hitting her in the face.

[3] J.T. circled the neck area on both the forward-facing diagram of a person and the backward-facing diagram of a person.

¶10 The jury found Howard guilty of strangulation and bail jumping, but found him not guilty of battery. The trial court sentenced Howard to one year and six months of initial confinement and two years of extended supervision for the strangulation count, but stayed the sentence and placed Howard on probation for two years. On the bail jumping count, the trial court sentenced Howard to sixty days in the House of Correction, consecutive to the other count, but also stayed that sentence and placed Howard on a concurrent two-year period of probation.

¶11 With the assistance of new counsel, Howard filed a postconviction motion seeking a new trial on grounds that the trial court erred when it received into evidence both the domestic violence form containing J.T.'s handwritten answers and Kapusta's testimony regarding that form.[4] Howard asserted that the admission of that evidence was improper because J.T. had not been asked about the form during direct examination, as required by WIS. STAT. § 906.13(2)(a).[5]

[4] Howard's postconviction motion did not assert that his trial counsel provided constitutionally deficient representation by failing to object to the admission of the domestic violence form and by telling the trial court he had no objection.

[5] WISCONSIN STAT. § 906.13(2) provides:

> EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT OF A WITNESS. (a) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable:
>
> 1. The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement.
>
> 2. The witness has not been excused from giving further testimony in the action.
>
> 3. The interests of justice otherwise require.

(continued)

¶12 In response, the State asserted that trial counsel's failure to object to the admission of that evidence constituted a waiver of Howard's objection to the evidence. Further, the State asserted, even if trial counsel had objected and the trial court had nonetheless admitted the evidence over that objection, the admission of the evidence would have been harmless error because there was other sufficient evidence of Howard's guilt.

¶13 In his reply brief, Howard argued that even though his trial counsel failed to object to the evidence, Howard could still seek relief based on the plain error doctrine. Howard asserted that it was plain error for the trial court to admit the evidence and that the admission of the evidence was not harmless error.

¶14 The trial court denied Howard's motion in a written order. Without explicitly deciding whether admission of the evidence was plain error, the trial court concluded that Howard was not entitled to a new trial because the admission of the evidence was harmless.[6] The trial court explained:

> The State contends that there was sufficient evidence apart from the domestic violence supplemental report to support the findings made by the jury, to wit, the 911 recording, Sergeant Mark Kapusta's observations of the victim's injuries, and Sergeant Kapusta's testimony regarding the victim's original statement to police. For these same reasons, the court finds that any error in this regard did not contribute to the verdict.

> (b) Paragraph (a) does not apply to admissions of a party-opponent as defined in s. 908.01(4)(b).

[6] The trial court also observed that the admission of the domestic violence form may have actually led to Howard's acquittal on the battery charge. Any potential benefits Howard received from admission of the form have not factored into our analysis of Howard's plain error argument.

This appeal follows.

DISCUSSION

¶15 On appeal, the parties agree that the domestic violence form and Kapusta's testimony about the form were inadmissible under WIS. STAT. § 906.13(2)(a)—the statute governing the presentation of extrinsic evidence of a witness's prior inconsistent statements—because J.T. was not asked "to explain or to deny the statement," J.T. was "excused from giving further testimony," and "[t]he interests of justice" did not require admission of the evidence. *See* ***id.*** At issue is whether admission of the form and Kapusta's testimony about the form was plain error and, if so, whether the error was harmless.

¶16 WISCONSIN STAT. § 901.03(4) codifies the "plain error" doctrine, which "allows appellate courts to review errors that were otherwise waived by a party's failure to object."[7] ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. ***Jorgensen*** summarized the relevant law concerning plain error:

> Plain error is error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time. The error, however, must be obvious and substantial. Courts should use the plain error doctrine sparingly. For example, where a basic constitutional right has not been extended to the accused, the plain error doctrine should be utilized. Wisconsin courts have consistently used this constitutional error standard in determining whether to invoke the plain error rule.
>
> However, the existence of plain error will turn on the facts of the particular case. The quantum of evidence

[7] WISCONSIN STAT. § 901.03(4) provides: "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."

> properly admitted and the seriousness of the error involved are particularly important. Erroneously admitted evidence may tip the scales in favor of reversal in a close case, even though the same evidence would be harmless in the context of a case demonstrating overwhelming evidence of guilt. Thus, no bright-line rule exists to determine automatically when reversal is warranted.

Id., ¶¶21-22 (internal quotation marks and citations omitted). If a defendant is able to demonstrate "that the unobjected to error is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless." ***Id.***, ¶23. When considering whether an error is harmless, courts must determine "whether the State can prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***Id.*** (citation and internal citation marks omitted). ***Jorgensen*** explained that courts consider a number of factors "to assist in determining whether an error is harmless," including:

> (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case.

See ***id.*** (citation omitted). "If the State fails to meet its burden of proving that the errors were harmless, then the court may conclude that the errors constitute plain error." ***Id.***

¶17 With those standards in mind, we begin our analysis by considering whether the trial court committed plain error when it admitted the domestic violence form and Kapusta's testimony about it. Howard argues that the information on the domestic violence form was "obvious" hearsay and "should not have been received in evidence at the trial." He further states that "[t]he

information was substantial and fundamental in obtaining the guilty verdicts against the defendant."

¶18 Howard asserts that there were several pieces of evidence indicating that he strangled J.T.: (1) J.T.'s statements to the 911 operator; (2) Kapusta's testimony that he saw red marks on J.T.'s neck; and (3) the domestic violence form and Kapusta's testimony about that form. Howard argues that the first two pieces of evidence were not compelling. He notes that on the 911 call, J.T. "completely downplayed the significance of [Howard putting his hands around her neck], stating that she did not need medical attention and that what she really wanted was to have the police help her to get her 'stuff' out of there." Next, Howard points out that J.T. testified "that the red marks around her neck had not been made by" Howard. Thus, he concludes, the domestic violence form was "[m]uch more important to the [S]tate's case," in part because it "showed the areas where the victim had indicated she had been injured."

¶19 We are not persuaded that the trial court's decision to admit into evidence the domestic violence form and Kapusta's related testimony—instead of *sua sponte* denying the State's request after trial counsel said he did not object—was plain error. At the time the trial court admitted the evidence, J.T. had already denied making numerous statements to Kapusta and had told the jury that she lied to the 911 operator and intentionally scratched her own neck. She had also denied that she signed a written statement. We are not convinced that after this testimony it should have been obvious to the trial court that the State had neglected to specifically ask J.T. about the domestic violence form and "give the witness an opportunity to explain or to deny the statement." *See* WIS. STAT. § 906.13(2)(a)1.

¶20 Furthermore, Howard has not adequately explained how the error was fundamental or substantial. ***Jorgensen*** indicates that the plain error doctrine should be used "sparingly" to afford relief to defendants, such as "where a basic constitutional right has not been extended to the accused." *See* ***id.***, 310 Wis. 2d 138, ¶21 (two sets of quotation marks and citations omitted). Howard baldly states that his "constitutional right to confrontation" was denied. However, it is undisputed that his trial counsel was permitted to cross-examine J.T. at length about her argument with Howard, her statements to Kapusta and the 911 operator, and whether she had signed any written statements. J.T.'s response was to deny being assaulted, deny making certain statements to Kapusta, deny signing a written statement, and assert that she called 911 and lied to the 911 operator in order to get Howard in trouble. Howard does not adequately explain, with references to authority, how the lack of questions specifically about the domestic violence form constituted an unconstitutional denial of his right to confrontation. We decline to develop an argument for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (stating that the court "may decline to review issues inadequately briefed" and that "[a]rguments unsupported by references to legal authority will not be considered").

¶21 We are not convinced Howard has demonstrated that the admission of the evidence was obvious, fundamental, and substantial. *See* ***Jorgensen***, 310 Wis. 2d 138, ¶21. But even if we assume for purposes of this appeal that Howard did meet this burden, he is nonetheless not entitled to relief because, having considered the factors identified in ***Jorgensen***, we agree with the trial court that the State has demonstrated that the alleged error—admission of the form and Kapusta's testimony about it—was harmless.

¶22 The domestic violence form was one of numerous pieces of evidence from the day of the incident that supported the State's theory that Howard strangled J.T. The jury listened to the 911 call, saw photographs of J.T.'s injuries, and heard testimony from Kapusta concerning his observations of J.T. and his conversation with J.T. about her injuries. Although Howard suggests the domestic violence form was the "most important" piece of evidence, we conclude that "the erroneously admitted evidence duplicates untainted evidence." *See* ***id.***, ¶23.

¶23 Another factor, "the nature of the defense," *see* ***id.***, also suggests the error was harmless. Howard's defense was that he did not strangle or injure J.T. and that she was lying when she called the 911 operator. J.T.'s testimony that she lied to get Howard in trouble supported his defense. That testimony also provided a basis for the jury to discount the information on the form. Just as the jury could have chosen to believe J.T. when she said she lied to the 911 operator and scratched her own neck, they could have likewise concluded that J.T.'s handwritten answers on the domestic violence form were also lies she told to get Howard in trouble.

¶24 Finally, the State's evidence was strong. The State produced an audio recording of J.T.'s statements to the 911 operator, photographic evidence of J.T.'s injuries, and testimony of the officer's observations about J.T.'s distress and nervousness. We are convinced the State has shown beyond a reasonable doubt that a rational jury would have found Howard guilty even if the domestic violence form and Kapusta's testimony about it had not been admitted. *See* ***id.***, ¶23.

By the Court.—Judgment and order affirmed.

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