

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 28, 2002

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. 01-1675-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-131

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. DAER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
JOHN R. RACE, Judge. *Reversed and cause remanded.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Mark A. Daer appeals from a judgment convicting him of engaging in repeated acts of sexual assault of the same child contrary to WIS. STAT. § 948.025(1) (1997-98). On appeal, he seeks a new trial because the prosecutor's conduct prevented the real controversy from being fully tried. We agree and reverse and remand for a new trial.

¶2 The complaint alleged that Daer sexually assaulted his eight-year-old stepdaughter multiple times between October 1997 and March 1998. The following incidents at trial lead us to conclude that we must reverse and remand for a new trial: (1) the State’s filing of perjury charges against Daer’s wife, Trina, during the trial; (2) cross-examination of Trina Daer about prior sexual abuse of her children and her allegation that she saw a detective look through defense files on the defense table; (3) the prosecutor’s improper focus during closing argument on Trina Daer; and (4) the prosecutor’s comment during closing argument that defense attorneys routinely trumpet their clients’ innocence no matter what the evidence at trial. Taken together, we conclude that the prosecutor’s conduct kept the real controversy from being fully tried.¹

¶3 Under WIS. STAT. § 752.35 (1999-2000), we may reverse if the jury had before it matters “which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.” *State v. Ambuehl*, 145 Wis. 2d 343, 366, 425 N.W.2d 649 (Ct. App. 1988). We need not find a probability of a different result on retrial; rather, we may consider the totality of the circumstances and determine whether a new trial is necessary “to accomplish the ends of justice.” *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996) (citation omitted).

¶4 The perjury charge against Trina Daer arose out of an incident on the first day of trial. Mrs. Daer told defense counsel that she saw a detective looking through defense counsel’s file while the file sat on counsel’s courtroom table. The

¹ In so concluding, we rely primarily upon the reply brief filed by Assistant State Public Defender Michael Yovovich. The appellant’s brief was filed by previously appointed counsel. The State was permitted to file a supplemental brief to respond to the new arguments raised in the reply brief.

court held an evidentiary hearing on the allegation. The detective testified that he approached the table because he believed it was being used by the State for trial. He looked at the top paper on the file, but did not look through the file. He picked up the paper and read two lines of it. When Mrs. Daer stated that he was looking at the defendant's paper, the detective set the paper down and left the room. The paper was a note from Daer to his counsel.

¶5 Trina Daer testified that she saw the detective thumbing through defense counsel's papers for approximately three to four minutes and that he lingered on a paper prepared by the defendant. The note was between two or three other papers not on top of the file. She walked over to the table and folded up the defendant's materials so the detective could not read them.

¶6 A friend of Mrs. Daer's testified that she also saw the detective look through defense counsel's papers, pick up a piece of paper and read it for approximately three to four minutes.

¶7 The incident was caught on videotape, and the court played the videotape. The videotape showed the detective at the defense table picking up a piece of paper. Mrs. Daer approached the table and told the detective to close the file. The detective then realized he was at the wrong table. The parties agreed and the court found that the detective spent approximately forty-four seconds holding the paper. The court found that from where she was sitting, Mrs. Daer could not have seen whether the detective was rummaging through the file, even though he picked up a piece of paper. Therefore, Mrs. Daer's claim that the detective was rummaging through the file was not true. The court also deemed inaccurate Mrs. Daer's testimony that the detective spent three to four minutes at the defense table.

¶8 Defense counsel questioned the detective about what he recalled from the piece of paper. The detective recalled the title of the document and the first two lines. The paper listed things that Daer felt the detective had lied about and stated that the detective told Daer that Trina was going to have a rummage sale and sell his gun collection. The court found that the detective did not intend to read defense material or seek to gain an unfair advantage for the State. The court barred the detective from serving as the prosecutor's court officer and ordered the detective not to share what he had read with the prosecutor.

¶9 During her testimony for the State, the prosecutor asked Mrs. Daer about her earlier testimony that she saw the detective looking through the defense file for three to four minutes. Daer objected on relevancy grounds. The State responded that Mrs. Daer had lied or exaggerated about the detective's conduct that morning and suggested that she would be willing to do so in the future to benefit her husband. The court barred further questioning in this area.

¶10 At the end of the State's case-in-chief, Mrs. Daer and her friend were arrested and charged with perjury relating to their testimony about the detective's view of materials at the defense table.

¶11 When Trina Daer was called as a defense witness, an issue surfaced regarding sexual abuse of the children by someone other than Daer. Out of the presence of the jury, Mrs. Daer testified that beginning in November 1995, her daughters, including the victim, would become very upset if she tried to bathe them below the waist and they required assistance to use the bathroom. The girls had not been living with her for a period of time before this behavior started. The court instructed Mrs. Daer not to testify about the reasons for the daughters' behavior.

¶12 After the jury returned, Mrs. Daer testified that from November 1995 until October 1998, when the children were removed from her home, she was unable to bathe her daughters from the waist down because the children would become extremely upset. Mrs. Daer believed that the children's fear of being touched below the waist made it impossible for Daer to have had sexual contact with them.² The prosecutor questioned Mrs. Daer about why she did not tell her husband's counsel of her belief that the children would not have permitted sexual contact in the manner alleged against Daer. Mrs. Daer stated that she told a child protective services investigator, but that the children would not speak to the investigator about what had happened.³ The prosecutor suggested that perhaps the children were embarrassed at having been sexually assaulted, and Mrs. Daer responded that she knew the children had been molested before. The prosecutor responded that despite being instructed by the court not to talk about the fact that she had accused another man of molesting the children, Mrs. Daer mentioned it anyway. Mrs. Daer responded that the prosecutor had "backed [her] into a corner" by continuing to question her about why she did not mention the earlier molestation when Daer was initially accused of sexually assaulting the children. The prosecutor then asked Mrs. Daer if she had been backed into a corner when she testified under oath that the detective had rummaged through defense counsel's file for three to four minutes when the videotape established that this was not true. The court intervened, noting that Mrs. Daer did not have counsel

² Daer's alleged sexual contact with the other child occurred in Illinois and was not part of this prosecution for conduct in Wisconsin.

³ On rebuttal, the investigator testified that she did not recall Mrs. Daer telling her that the victim would scream if touched below the waist.

and had a right to silence. Mrs. Daer then invoked her right to silence in front of the jury.

¶13 During closing argument, the prosecutor argued the evidence, but placed an inordinate amount of focus on Mrs. Daer's testimony.

And I think it's clear from her testimony she had done everything in her power that she could during this trial to try and affect its outcome in favor of her husband. She has lied, she has cheated, she violated court orders.

¶14 The prosecutor also noted that Mrs. Daer had testified, contrary to a court order, that another man previously sexually assaulted her children, hoping to convince the jury that the allegations against Daer actually related to the conduct of the other man. The prosecutor repeatedly suggested that Mrs. Daer had lied in order to protect Daer. The prosecutor then argued that if the jurors believed Daer and his wife, they should acquit Daer, but if they believed the victim more than Daer and his wife, they had to convict Daer.

¶15 In his rebuttal closing argument, the prosecutor disparaged defense counsel's insistence on Daer's innocence and counsel's contention that the State had not met its burden of proof. The prosecutor stated:

That's what defense attorneys are required to do, and he has done that job well, but that is his job as well. His job isn't to get up here, and I have yet to see in a couple hundred jury trials a defense attorney to get up in closing argument and say, you know, when I came in here I thought my client was not guilty, but that evidence was pretty overwhelming, I guess I was wrong, he is guilty. They get up whatever the evidence is and say it's not proven, and that's [defense counsel's] job as well.

¶16 The prosecutor conceded that Mrs. Daer was not on trial, and denied trying to suggest to the jury that she was on trial. But then the prosecutor returned to his theme that Mrs. Daer was crucial to the jury's analysis of the evidence.

¶17 On appeal, Daer argues that the combined effect of the foregoing instances of prosecutorial conduct diverted the jury from the real controversy: whether Daer committed the charged crimes.⁴ After considering the totality of the circumstances and seeking to accomplish the ends of justice, *Hicks*, 202 Wis. 2d at 160, we conclude that the real controversy was not fully tried as a result of the prosecutor's conduct.

¶18 Counsel is allowed considerable latitude in closing argument. *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). "The prosecutor may 'comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him [or her] and should convince the jurors.'" *Id.* (citation omitted). "The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." *Id.*

¶19 While Mrs. Daer's credibility was open to fair comment at trial, we conclude that the prosecutor's undue emphasis on Mrs. Daer placed before the jury evidence and inferences that clouded the crucial issue of Daer's guilt and prevented the real question of Daer's guilt from being fully tried. Even though the

⁴ Several of these instances did not elicit an objection from Daer's trial counsel. However, this court may, in its discretion, address issues which are otherwise waived. *State v. Copening*, 103 Wis. 2d 564, 571, 309 N.W.2d 850 (Ct. App. 1981). We do so here.

prosecutor conceded that Mrs. Daer was not on trial, this concession was an inadequate counterweight to the prosecutor's repeated focus on Mrs. Daer during trial and closing argument. By charging Mrs. Daer with perjury during the trial and then continuing to question her about the incident involving the defense file, the prosecutor effectively put Mrs. Daer on trial. Through the charging decision and the questioning at trial, the prosecutor created a situation in which Mrs. Daer had to assert her right to silence in front of the jury.⁵ Finally, the prosecutor's gratuitous comment about the habits of defense attorneys was one more example of the prosecutor's argument going off track. We reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded.

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

⁵ We criticize only the prosecutor's decision to arrest Mrs. Daer and charge her with perjury during the trial. Had the prosecutor waited until the trial concluded, there would have been less opportunity to misdirect the jury's focus.

