COURT OF APPEALS
DECISION
DATED AND RELEASED

March 27, 1996

No. 95-1726-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JULIAN C. HOLT,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: ROBERT V. BAKER, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Julian C. Holt appeals from a judgment of conviction for first-degree intentional homicide with a weapon and from an order denying his motion for postconviction relief. On appeal, Holt contends that various of the prosecutor's statements at closing arguments so infected his trial that he was denied due process of law. While we conclude that some of the

prosecutor's remarks were improper, we cannot say that any of them rises to the level of plain error or that any requires a discretionary reversal under § 752.35, STATS. Accordingly, we affirm the judgment and the order of the circuit court.

Holt was convicted of killing David Umfress, Jr. Holt, along with Mark Pawlicki, had gone to Umfress' apartment on the night of January 2, 1994, where they ate potato chips, listened to music and smoked marijuana. They were later joined by Florin Adamson, who came to buy drugs from Umfress. Pawlicki testified that, at one point, Holt came up behind Umfress, stabbed him in the back, grabbed him around the head, and directed him toward the bedrooms. Adamson, who was out on the landing, reentered, heard Umfress screaming and saw Holt in a darkened bedroom swinging his arm down and striking Umfress. Both Pawlicki and Adamson then left. Adamson testified that he came back later with a friend, but that by that time "there was police tape everywhere," so they left.

Holt testified that he stabbed Umfress only after Umfress came after him with a knife. His version was that Umfress accused him of stealing marijuana and approached him holding a knife. Holt knocked it out of his hand, picked it up, chased him into Umfress' bedroom and stabbed him because he "had a feeling he was going for his shotgun ...." Holt testified that Umfress grabbed the shotgun, which went off while the two of them struggled over it. Holt testified that he could not recall stabbing Umfress more than two times. Holt then went to his uncle's house and explained what happened to his uncle, his uncle's girlfriend, Georgette Timoshuk, and her brother, Robert Timoshuk.

Georgette testified that Holt told her that he could not stop stabbing Umfress. Robert testified that Holt told him that he stabbed Umfress about fifty times.

During closing arguments, defense counsel posited that Adamson came back to Umfress' apartment after Holt had left and stabbed Umfress with a second knife. The prosecutor objected, contending that no evidence or testimony supported this theory. While the trial court indicated some reservations about the defense's line of argument, it took the motion under advisement and allowed the defense to continue. The prosecutor again objected when the defense claimed that the blood in the bedroom had not come from the stabbing.

At the beginning of his rebuttal argument, the prosecutor stated:

> Total lack, total absence of any defense in this case as manifested with the bush-league tactics that were just employed by defense counsel in his closing argument. ... Let me tell you folks that this is the way it is done. All of the evidence that I have is given to the defense attorney well in advance of trial. Now, they're not obligated to tell me what their defense is before the trial starts. That's the way the rules are. I'm obligated to give them everything. They are not obligated to give me much of anything.

After further comment concerning the lack of evidentiary support for defense counsel's claim about Adamson, the prosecutor stated that the evidence "wasn't presented because he chose not to show this theory under light of day." Defense counsel objected, stating that "[w]e don't have any obligation to present a defense. I would object to that statement." The prosecutor then continued:

> He chose not to ask Florin Adamson questions about whether he came back or not because he saw the statements, the

> detectives reports. He saw the photographs in the State's file showing Florin Adamson had not a drop of blood on his person when he was interviewed by the police that same night.

The prosecutor went on to refer to the defense as using "these kind of bush-league tactics. This kind of a ambush." The jury ultimately found Holt guilty, and this appeal ensued.

We begin with the fact that the defense leveled no contemporaneous objections to those arguably improper parts of the prosecution's closing argument. Failure to object at the time of the alleged improprieties in the closing argument waives review of that error. ***State v. Goodrum,*** 152 Wis.2d 540, 549, 449 N.W.2d 41, 46 (Ct. App. 1989). However, we may overlook waiver where the error is so plain or fundamental as to affect the substantial rights of the defendant. ***State v. Neuser,*** 191 Wis.2d 131, 140, 528 N.W.2d 49, 53 (Ct. App. 1995).

We have explained the requisite magnitude of an error deemed to be "plain:" "it must be so fundamental that a new trial or other relief must be granted." ... A "plain error" is one that is "both obvious and substantial" or "grave," ... and the rule is "reserved for cases where there is the likelihood that the [error] ... has denied a defendant a basic constitutional right." ***State v. Vinson,*** 183 Wis.2d 297, 303, 515 N.W.2d 314, 317 (Ct. App. 1994) (citations and quoted sources omitted). While the prosecutor's description of the discovery

process and his allusion to matters not in evidence[1] are certainly "obvious" errors, we are unpersuaded that here they are either "substantial" or "grave."

All of the complained of comments were engendered by and responsive to defense counsel's closing argument that Adamson later returned to stab Umfress after Holt did, a highly speculative theory with no real support in the record. None of the prosecutor's comments improperly undermined Holt's right to present a defense, which here was self-defense. Because these comments undercut a theory which was not pursued or developed at trial and was tenuous at best, we cannot say that any error in those comments was either substantial or grave.[2] Accordingly, we affirm the judgment and the order of the circuit court.

By the Court.—Judgment and order affirmed.

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

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[1] While they might certainly be deemed intemperate, we are unpersuaded that the other matters complained of, namely, the prosecutor's comments upon Holt himself and the Adamson-based defense itself, rise to the level of error, given the circumstances. One of the "hard blows" a prosecutor may strike is comment upon the opponent's arguments. *See* ***United States v. West***, 670 F.2d 675, 688 (7th Cir.), *cert. denied*, 457 U.S. 1124, 1139 (1982).

[2] To the extent that Holt mounts a § 752.35, STATS., discretionary reversal argument, we reject any such invitation. We are persuaded that the real controversy was indeed fully tried.